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No. 90-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ANNE DUFFY POKORNY, Administratrix
of the Estate of John Duffy, Deceased,

Petitioner

v.

FORD MOTOR COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED[1]

Whether the court of appeals erred in deciding that when Congress explicitly declared its intent that compliance with any federal motor vehicle safety standard would not exempt any person from any liability under common law, its implicit intent was to preempt common law tort claims for lack of air bags or automatic seat belts?

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[1] Petitioner Anne Duffy Pokorny, Administratrix of the Estate of John Duffy, appeared as plaintiff-appellant below. Respondent Ford Motor Company appeared as defendant-appellee below. In addition, the Motor Vehicle Manufacturers Association of the United States, Inc. and the Product Liability Advisory Council, Inc. appeared as *amici curiae* in the court of appeals in support of the position of Ford Motor Company.

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OPINIONS BELOW

The opinion of the district court is reported at 714 F.Supp. 739 (E.D.Pa. 1989) and appears in the appendix to this petition at App. A26-A34. The opinion of the court of appeals is reported at 902 F.2d 1116 (3rd Cir. 1990) and appears at App. A1-A25.

JURISDICTION

The decision of the court of appeals was entered on April 30, 1990. App. A1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381–1431, Pub.L.No. 89–563, 80 Stat. 718 (hereinafter "Safety Act") provides in pertinent part as follows:

> § 1392(d). Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal

standard.

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> § 1397(k). Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.[2]

Relevant excerpts from Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 (hereinafter "Standard 208"), appear at App. A36–A40. The 1981 Ford Econoline van in issue in this case is a "multipurpose passenger vehicle with GVWR [gross vehicle weight rating] of 10,000 pounds or less manufactured on or after January 1, 1976." 49 C.F.R. § 571.208 S4.2.2.

STATEMENT OF THE CASE

Procedural History

On October 16, 1985, Anne Duffy Pokorny (hereinafter "Pokorny"), Administratrix of the Estate of John Duffy, deceased, filed a civil action against the Ford Motor Company (hereinafter "Ford") in the Court of Common Pleas of Philadelphia County, Pennsylvania at June Term, 1985, No. 1933. On November 13, 1985, upon the petition of Ford, the case was removed to the United States District Court for the Eastern District of

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[2] This provision was formerly codified at 15 U.S.C. § 1397(c).

Pennsylvania at Civil Action No. 85-6544.

On August 25, 1987, Ford filed Defendant's Motion for Summary Judgment in the district court. The Honorable Thomas N. O'Neill, Jr., Judge of the United States District Court for the Eastern District of Pennsylvania, granted Ford's motion and entered judgment against Pokorny and in favor of Ford on June 8, 1989. *Pokorny v. Ford Motor Co.*, 714 F.Supp. 739 (E.D.Pa. 1989); App. A35. Pokorny appealed to the United States Court of Appeals for the Third Circuit from the district court decision. The court of appeals affirmed in part and reversed in part the decision of the district court. *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990); App. A1-A25.

Facts Relevant to the Issue Presented[3]

On December 10, 1983, John Duffy, a 22-year-old Philadelphia police officer, was killed in the line of duty. Officer Duffy was a passenger in a 1981 Ford Econoline police van driven by Officer James R. Coughlin. While responding to an "assist officer" emergency police radio dispatch, the van collided with a police patrol car answering the same call. After the first collision, the van rolled over and Officer Duffy was partially ejected through the passenger side window and was crushed by the van. Officer Duffy died as a result of the injuries he sustained in this "second collision."

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[3] The facts underlying this action are not in dispute on appeal.

The City of Philadelphia purchased the 1981 Ford Econoline van as a part of a fleet for use as a police patrol and transport vehicle. The van as provided by Ford was not crashworthy and, therefore, defective, because Ford failed to manufacture it with necessary safety systems that would have prevented Officer Duffy's partial ejection from the vehicle and his resulting death. Such technologically and financially feasible safety systems included passive seat belts that automatically engage the vehicle's occupants on entering, other types of passive passenger restraint systems, and protective netting or other material at the window to prevent ejection. Had the van been properly designed and equipped, Officer Duffy would not have been ejected and crushed when the vehicle rolled over.

Decision of the District Court

The district court concluded that Pokorny's Pennsylvania common law cause of action, alleging that the lack of suitable passive occupant protection rendered the police van defective, is impliedly preempted by the Safety Act and Standard 208, but did not rule on whether common law tort claims are expressly preempted by the Safety Act or Standard 208. *See Pokorny*, 714 F.Supp. at 742; App. A31. The district court found implied preemption in spite of the explicit expression of Congressional intent in the Safety Act that "[c]ompliance with any federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under the common law," 15 U.S.C. § 1397(k), and in spite of the fact that there is no actual conflict between the Safety Act or Standard 208 and a common law judgment on the theory of liability advanced by Pokorny.

Decision of the Court of Appeals

The decision of the district court was affirmed in part and reversed in part by the United States Court of Appeals for the Third Circuit. *See Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990); App. A1–A25. The court of appeals concluded that, to the extent the district court's decision was based on Pokorny's assertion that the Ford van should have been equipped with air bags or automatic seat belts, the action is impliedly preempted by Standard 208. The court of appeals held that, although such actions are not expressly preempted by federal law, common law liability arising from the failure to install one of these two particular types of passive restraints would present an actual conflict with federal regulations. However, according to the court of appeals, not all design defects arising from a failure to provide passive restraints pose an actual conflict with the Safety Act or Standard 208, and thus the court of appeals left open the question of whether Ford's failure to equip its van with other passenger protective devices, such as window netting, is a design defect actionable under the applicable Pennsylvania law of products liability.

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

1. IN THE FACE OF AN INCREASING NUMBER OF TORT CLAIMS ALLEGING FAILURE ON THE PART OF MOTOR VEHICLE MANUFACTURERS TO INCLUDE AIR BAGS OR AUTOMATIC SEAT BELTS IN THEIR VEHICLES, COURTS THROUGHOUT THE COUNTRY HAVE DIVERGED WIDELY ON WHETHER SUCH CLAIMS ARE PREEMPTED.

Perhaps the most compelling reason for this Court to grant the writ of certiorari requested herein is the need to impose uniformity in an area in which courts throughout the country have splintered in numerous directions. Presented with an increasing array of state common law tort claims alleging liability on the part of motor vehicle manufacturers for failure to equip their vehicles with air bags, automatic seat belts or other passive passenger restraints, both federal and state courts uniformly have been called upon to address one crucial issue: whether such claims are preempted by the provisions of the Safety Act and/or Standard 208. Their answers, however, have been far from uniform.

A number of different courts when faced with the issue have directly or indirectly held that state common law claims for lack of passive passenger restraints are not preempted and, indeed, have found that Section 1397(k) of the Safety Act expressly *preserves* these claims. *See Shipp v. General Motors Corp.*, 750 F.2d 418 (5th Cir. 1985); *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974); *Chrysler Corp. v. Tofany*, 419 F.2d 499 (2d Cir.

1969); *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). *See also Murphy v. Nissan Motors in U.S.A.*, 650 F.Supp. 922 (E.D.N.Y. 1987); *Gingold v. Audi–NSU–Auto Union, A.G.*, 389 Pa.Super. 328, 567 A.2d 312 (1989).

By contrast, other courts addressing the same issue have concluded just the opposite, ruling that the Safety Act and Standard 208 *do* preempt state common law claims. *See Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 1781 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied,* 110 S.Ct. 1781 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 110 S.Ct. 1781 (1990); *Cox v. Baltimore County*, 646 F.Supp. 761 (D.Md. 1986); *Vanover v. Ford Motor Co.*, 632 F.Supp. 1095 (E.D.Mo. 1986). *See also Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn.Ct. App. 1987), *cert. denied*, 476 U.S. 1236 (1988).

Even in the cases finding preemption, however, their is very little agreement. The courts in *Cox, Vanover* and *Wickstrom* held that the claims for lack of passive passenger restraints are *expressly* preempted by the Safety Act, yet *Pokorny, Taylor, Kitts* and *Wood* all rejected this analysis, ruling instead that such claims are only *impliedly* preempted.

Adding further to the confusion is the fact that among the courts finding implied preemption, there is utter disagreement as to the reasons therefor. The *Wood* court found implied preemption based on its belief that Congress did not foresee the development of design defect litigation when it passed the Safety Act in 1966, a rationale rejected in *Pokorny* and *Kitts*. In *Kitts*, the court based its implied

preemption analysis largely on the theory that national uniformity of safety regulations is an important Congressional purpose, while *Taylor* held that so long as a vehicle manufacturer used one of the occupant restraints permitted by Standard 208, all claims for lack of passive passenger protection are impliedly preempted as frustrating the regulatory flexibility provided by Standard 208. The *Pokorny* court refused to follow *Wood, Kitts* or *Taylor*, holding that *only* claims premised on the absence of air bags or automatic seat belts are impliedly preempted, since Standard 208 allows vehicle manufacturers the right to use manual seat belts as well.

Although confronting the same preemption issue, the various circuit courts of appeals and others throughout the country have been unable to develop a consensus, but instead have issued numerous opinions reaching varying conclusions. Furthermore, even in those instances where the same result has obtained, the courts have not been able to agree on a single coherent rationale but, in fact, have devoted a great deal of attention to criticizing each other's line of reasoning. In short, what has been created is a tangled web of judicial confusion over an important national issue and, as a result, the success or failure of identical claims for lack of passive restraints can depend solely on the fortuity of the jurisdiction in which they arise.

Obviously, this is neither practical nor just. Because courts across the country have been incapable of agreeing, despite numerous opportunities, on the recurrent issue of whether common law damages claims against vehicle manufacturers are preempted by the Safety Act and/or Standard 208, the time has come for this Court to clear the confusion. To deny the petition for writ of certiorari in this case would serve only to continue a situation that is

patently unfair not only to those injured through lack of appropriate passive restraints in motor vehicles, but to the vehicle manufacturers themselves, whose potential liability can now shift from jurisdiction to jurisdiction. Accordingly, petitioner urges this Court to grant her petition for writ of certiorari in order to resolve this important national issue.

2. THE COURT OF APPEALS ERRED IN DECIDING THAT WHEN CONGRESS EXPLICITLY DECLARED ITS INTENT THAT COMPLIANCE WITH ANY FEDERAL MOTOR VEHICLE SAFETY STANDARD WOULD NOT EXEMPT ANY PERSON FROM ANY LIABILITY UNDER COMMON LAW, ITS IMPLICIT INTENT WAS TO PREEMPT COMMON LAW TORT CLAIMS FOR LACK OF AIR BAGS OR AUTOMATIC SEAT BELTS.

The theory of liability advanced by Pokorny in this case is not novel or unique. At least since the seminal decision in *MacPhearson v. Buick Motor Co.*, 217 N.Y.2d 382, 111 N.E. 1050 (1916), the common law has imposed liability on automobile manufacturers to compensate victims of defective vehicles. The evolution of the common law has extended the manufacturers' responsibility for the prevention and minimization of injury to automotive passengers in the inevitable event of collisions. The decision in *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968) set forth the standard for vehicle "crashworthiness" in a "second collision," which is the collision of a vehicle occupant that occurs after and as a result of the collision of the vehicle itself into another

vehicle or some other object. According to the *Larsen* court:

> [w]hile automobiles are not made for the purpose of colliding with each other, a frequent and inevitable contingency of normal automobile use will result in collisions and injury-producing impacts. No rational basis exists for limiting recovery to situations where the defect in design or manufacture was the causative factor of the accident, as the accident and the resulting injury, usually caused by the so-called "second collision" of the passenger with the interior part of the automobile, all are foreseeable. Where the injuries or enhanced injuries are due to the manufacturer's failure to use reasonable care to avoid subjecting the user of its products to an unreasonable risk of injury, general negligence principles should be applicable. The sole function of an automobile is not just to provide a means of transportation, it is to provide a means of safe transportation or as safe as is reasonably possible under the present state of the art.

Id. at 502 (footnote omitted).

Under Pennsylvania common law, Ford was duty-bound to design and build the police van that crushed Officer Duffy with "every element necessary to make it safe for [its intended] use, and without any condition that makes it unsafe for [its intended] use." *Smialek v. Chrysler Motors Corp.*, 290 Pa.Super. 496, ___, 434 A.2d 1253, 1256 (1981). This duty has been repeatedly recognized by

Pennsylvania courts and by federal courts applying Pennsylvania law. *See, e.g., Lobianco v. Property Protection, Inc.*, 292 Pa.Super. 346, 437 A.2d 417 (1981); *Olsen v. United States*, 521 F.Supp. 59 (E.D.Pa. 1981), *aff'd*, 688 F.2d 820 (3d Cir. 1982), *cert. denied*, 459 U.S. 1107 (1983), and cases cited therein.

Ford's "preemption" argument is founded on article VI, clause 2 of the United States Constitution, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

There are three ways in which a federal statute may preempt state law under the Supremacy Clause. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698–99 (1984). They are:

> First, Congress may expressly state an intent to preempt state law.[4]

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[4] The court of appeals held that the Safety Act does not expressly preempt any of Pokorny's claims. *Accord Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 1781 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), (continued...)

Second, Congress may indicate an intent to occupy an entire field of regulation;[5] and

Third, state laws are preempted by implication to the extent that they create an actual conflict with the policies of a specific federal law (implied preemption).[6]

According to this Court, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)(citing *Rice v. Santa Fe Elevator Corp.*, 531 U.S. 218 (1947)). In addition to the

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[4](...continued)
cert denied, 110 S.Ct. 1781 (1990); *Shipp v. General Motors Corp.*, 750 F.2d 418 (5th Cir. 1985); *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d. Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968).

[5] It is apparent from section 1392(d) of the Safety Act, and Ford has conceded in the district court, that Congress has not preempted the entire field of automotive safety. "[States] may regulate on 'aspects of performance' not specifically established by the federal government." *Chrysler Corp. v. Rhodes*, 416 F.2d 319 (1st Cir. 1969).

[6] It is on the basis of this third theory that the court of appeals determined that Pokorny's claim is preempted by the Safety Act and Standard 208. 902 F.2d at 1123–25; App. A15–A22. It is, therefore, only implied preemption that will be addressed at length in this petition.

required assumption against preemption there is an express statement of legislative intent in the Safety Act to preserve common law claims. "Compliance with *any* federal motor vehicle safety standard issued under this subchapter does not exempt *any* person from *any* liability under common law." 15 U.S.C. § 1397(k)(emphasis added).

Pokorny's Claims Present No Actual Conflict with Standard 208

The court of appeals held that Standard 208 impliedly preempts Pokorny's common law claims because such state "regulation" by jury verdict would *actually* conflict with the purpose of Standard 208, which is designed to give manufacturers a choice among passenger restraint options. 902 F.2d at 1123–25; App. A15–A22. However, the stated purpose of the Safety Act is to decrease the carnage resulting from automobile accidents where inadequate safety standards were followed by the industry and the user. *See Motor Vehicle Mfrs Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49 (1983). Although Congress may have intended to allow some flexibility in the *minimum* safety standards, Congress certainly did not intend to guarantee flexibility "at all costs."[7] Nor did Congress intend to promote uniformity at the expense of adequate remedies for those injured by defectively designed products of automobile manufacturers.

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[7] *See Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 257 (1984), holding that, while the Nuclear Regulatory Act was intended to encourage the development of nuclear power plants, it was not intended to encourage such development "at all costs." Thus, state tort claims that might inhibit that purpose are not preempted.

The reason for the enactment of the Safety Act is set forth in the statute as follows: "Congress hereby declares that the purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. Pursuant to this purpose Congress provided that "[t]he Secretary shall establish by order appropriate Federal Motor Vehicle Safety Standards." 15 U.S.C. § 1392(a). Congress defined a "Motor Vehicle Safety Standard" as "a *minimum* standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria." 15 U.S.C. § 1391(2)(emphasis added).

The court of appeals concluded that Standard 208 was specifically intended to provide manufacturers with a choice among "restraint system alternatives," 902 F.2d at 1124–25; App. A18–A22, and then reasoned that an award of damages for failing to choose one of those passive restraint alternatives removes the element of choice authorized in Standard 208. 902 F.2d at 1124–25; App. at A21–A22. This Court has cautioned, however, that where a federal regulatory system preserves a role for state law, as is the case under the Safety Act by virtue of Section 1397(k), 15 U.S.C. § 1397(k), "conflict pre-emption analysis must be applied sensitively... so as to prevent the diminution of the role Congress reserved to the states while at the same time preserving the federal role." *Northwest Central Pipeline Corp.v. State Corp. Comm'n of Kansas*, 489 U.S. 493, ___, 109 S.Ct. 1262, 1276 (1989). The sensitivity required by Section 1397(k) and the *Northwest Central Pipeline Corp.* decision compels the conclusion that Standard 208 does *not* confer an affirmative "right" on manufacturers to comply only with minimum standards and thus avoid liability for failure to meet common law

standards of care.

The Safety Standard Compliance Defense Has Been Rejected

As early as 1968, the United States Court of Appeals for the Eighth Circuit held that 15 U.S.C. § 1397(k) "expressly negatives any intention of Congress to acquire exclusive jurisdiction in this field and leaves the common law liability intact." *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968). The same analysis has been applied also by the Third Circuit Court of Appeals:

> Compliance with the safety standards promulgated pursuant to [the Safety Act], however, does not relieve [a manufacturer] of liability.... For, in authorizing the Secretary of Transportation to enact these standards, Congress explicitly provided, "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(c) (1976).

Dawson v. Chrysler Motors Corp., 630 F.2d 950, 958 (3d Cir. 1980) *cert. denied*, 450 U.S. 959 (1981). Whether federal standards "should" be conclusive in "crash-worthiness" cases is not a decision to be made by courts. Such a decision, if made, would have to be made by the appropriate legislative body. *See id.*, 630 F.2d at 963.

The decision of the court of appeals below is

contrary to holdings in other circuit court opinions such as *Shipp v. General Motors Corp.*, 750 F.2d 418, 421 (5th Cir. 1985)("Of course, compliance with such minimum safety standards does not exempt or immunize a manufacturer from common law strict liability... certainly Congress did not intend such a result..."); *Dawson*, 630 F.2d at 958 ("Compliance with the safety standards promulgated pursuant to the National Traffic and Motor Vehicle Safety Act, however, does not relieve Chrysler of liability in this action"); and *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968)("It is apparent that the National Traffic Safety Act [sic] is intended to be supplementary and in addition to the common law of negligence and product liability. The Act is... not an exemption from common law liability."). Other decisions holding that federal safety standards do not preempt state common law include *Knippen v. Ford Motor Co.*, 546 F.2d 993 (D.C. Cir. 1976); *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974); *Chrysler Corp. v. Tofany*, 419 F.2d 499 (2d Cir. 1969); *Gingold v. Audi-NSU-Auto Union, A.G.*, 389 Pa. Super. 328, 567 A.2d 312 (1989); *Roberts v. May*, 41 Colo. App. 82, 583 P.2d 305 (1978); *H.P. Hood and Sons, Inc. v. Ford Motor Co.*, 370 Mass. 69, 345 N.E.2d 683 (1976); *Buccery v. General Motors Corp.*, 132 Cal.Rptr. 605, 60 Cal.App.3d 533 (1976); and *Turner v. General Motors Corp.*, 514 S.W.2d 497 (Tex.Civ.App. 1974).

The Plain Language of the Safety Act Precludes Preemption

In determining whether common law or any other aspect of state law is preempted by federal law, a court's "sole task is to ascertain the intent of Congress." *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 280

(1987). In so doing, it must be assumed "that the legislative purpose is expressed by the ordinary meaning of the word[s] used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). Moreover, if there is any doubt as to whether Congress intended to preempt state law, that doubt is to be resolved against a finding of preemption. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Massachusetts Medical Soc'y v. Dukakis*, 815 F.2d 790 (1st Cir.), *cert. denied*, 484 U.S. 896 (1987). "The presumption against preemption is even stronger against preemption of state remedies, like tort recoveries, when no federal remedies exist." *Abbot by Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1112 (4th Cir.), *cert. denied*, 109 S.Ct. 260 (1988). *Accord Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

In the instant case, Congress explicitly and unequivocally expressed its intent to preserve *all* common law claims by enacting section 1397(k) of the Safety Act, which states "Compliance with *any* federal motor vehicle safety standard issued under this subchapter does not exempt *any* person from *any* liability under common law." (Emphasis added.) Given their plain meaning, these words preserve petitioner's claims. The court of appeals, however, concluded that Pokorny's claims are preempted, finding that Standard 208 not only gives manufacturers options for providing passenger restraints, including air bags and automatic seat belts, but that it also provides absolute immunity from common law claims based on a failure to install air bags or automatic seat belts. 902 F.2d at 1123-25; App. A15-A22.

Congress had several good reasons for preserving all common law claims. It sought to further the sole stated

purpose of the Safety Act -- "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. § 1381 -- by ensuring that all design defect victims would be compensated and by preserving the incentive for design improvements that potential tort liability creates. Indeed, Congress traditionally preempts direct state regulation and preserves tort claims, particularly in the area of consumer protection, and courts consistently respect that decision.[8] As this Court held in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, ___, 108 S.Ct. 1704, 1712 (1988):

> The effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of such an additional award

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[8] *See Abbot by Abbot v. American Cyanimid Co.*, 844 F.2d 1108 (4th Cir.)(FDCA does not preempt product liability claims), *cert. denied*, 109 S.Ct. 260 (1988); *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.)(Federal Insecticide, Fungicide and Rodenticide Act does not preempt product liability claims), *cert. denied*, 469 U.S. 1062 (1984); *Raymond v. Riegel Textile Corp.*, 484 F.2d 1025 (1st Cir. 1973) (Flammable Fabrics Act does not preempt product liability claims); *Hubbard-Hall Chemical Co. v. Silverman*, 340 F.2d 402 (1st Cir. 1965)(same as *Ferebee*), *Burch v. Amsterdam Corp.*, 366 A.2d 1079 (D.C.App. 1976) (Federal Hazardous Substance Act does not preempt product liability claims); *McIntire v. Estate of Forte*, 463 S.W.2d 491 (Tex.Civ.App. 1971)(Federal Aviation Act does not preempt common law claims). *See also* 15 U.S.C. § 2074 (1976) (Consumer Product Safety Act does not preempt common law liability).

> provision. ... We believe Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not. *Cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. at 256 (Congress was willing to accept regulatory consequences of application of state tort law to radiation hazards even though direct state regulation of safety aspects of nuclear energy was preempted).

Section 1397(k) of the Safety Act clearly and plainly preserves Pokorny's claims, and eliminates any doubt as to Congressional intent. The decision of the court of appeals finding partial implied preemption flies in the face of this statutory provision, and is clearly erroneous.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted by

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July 27, 1990

APPENDIX

Pokorny v. Ford Motor Co., 902 F.2d 1116 (3d Cir. 1990)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1527.

ANNE DUFFY POKORNY, Administratrix
of the Estate of John Duffy, Deceased,
Appellant,

v.

FORD MOTOR COMPANY, Appellee.

On appeal from the United States District
Court for the Eastern District of Pennsylvania
(D.C. Civil Action No. 85-6544)

Argued: January 24, 1990
Opinion Filed: April 30, 1990

Before: HUTCHINSON, SCIRICA and NYGAARD.
Circuit Judges.

OPINION OF THE COURT

HUTCHINSON, Circuit Judge.

Anne Duffy Pokorny (Pokorny), administratrix of the estate of John Duffy (Duffy), appeals from a district court order granting summary judgment in favor of Ford Motor Company (Ford). Duffy died in a traffic accident while a passenger in a Ford van. Pokorny claims that the

van was defectively designed. She contends that Ford's failure to provide adequate safety protection for passengers in its van was a design defect that subjected it to liability either in negligence or as a maker of a defective product. In particular, Pokorny alleges that the van should have been equipped with air bags, automatic seat belts or protective netting on the windows to prevent fatal injuries like those that Duffy suffered. The district court, adopting the reasoning of *Kolbeck v. General Motors Corp.*, 702 F.Supp. 532 (E.D.Pa.1988), held that the National Traffic and Motor Vehicle Safety Act (Safety Act), 15 U.S.C.A. §§ 1381–1431 (West 1982 & Supp.1990), and Federal Motor Vehicle Safety Standard 208 (Standard 208), 49 C.F.R. § 571.208 (1980),[1] impliedly pre-empted Pokorny's common law action and granted Ford's motion for summary judgment. *Pokorny v. Ford Motor Co.*, 714 F.Supp. 739, 742 (E.D.Pa.1989).

To the extent that the district court's judgment was based on Pokorny's assertion that the Ford van should have been equipped with air bags or automatic seat belts, we agree that the action was pre-empted by the Safety Act and Standard 208. Common law liability arising from the failure to install these two types of passive restraint systems would present an actual conflict with certain federal statutes and regulations. However, Pokorny's action is not pre-empted to the extent that it is based on other types of passive restraints, like the protective window netting she mentions, that do not present an actual conflict with federal

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[1] This is the version of Standard 208 that was in effect when the 1981 Ford van was manufactured. The current version of Standard 208 is substantially similar. *See* 49 C.F.R. § 571.208 (1989).

laws or regulations.[2] Because we agree with some, but not all, of the district court's pre-emption analysis, we will affirm the court's judgment with respect to pre-emption of common law liability for any design defect arising out of Ford's failure to equip its van with air bags or automatic safety belts. However, because not all design defects arising from a failure to provide passive restraints pose an actual conflict with the Safety Act or Standard 208, we will reverse the district court's judgment in part and remand on the question of whether Ford's failure to equip its van with passenger protective devices like window netting is a design defect actionable under the applicable Pennsylvania law of products liability.

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[2] The pre-emption question in this type of case often is discussed in terms of passive, or automatic, restraints, even though Standard 208 itself refers to automatic or passive protection systems. See 49 C.F.R. § 571.208, S4.1.2. *Cf. State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 476 (D.C.Cir.1986) (using the terms "passive restraints" and "passive protection devices" almost interchangeably), *cert. denied*, 480 U.S. 951 (1987). As we use the term, "passive restraints" includes any device intended to protect motor vehicle occupants from injury during a collision that is effective without affirmative action by the occupant. Under this usage, passive restraints are not limited to air bags and automatic seat belts. *See, e.g., Taylor v. General Motors Corp.*, 875 F.2d 816, 821 (11th Cir. 1989) (cushioned-back seats constitute passive restraints, similar in effect to air bags), *cert. denied*, __ U.S. __, 110 S.Ct. 1781 (1990). We do not think these differences in terminology affect the result in this case.

I.

The facts relevant to our review of the order granting summary judgment to Ford are not in dispute. Duffy was a twenty-two year old Philadelphia police officer. He was killed in December 1983 when the 1981 model Ford Econoline police van in which he was riding collided with another police patrol car while responding to an emergency call. Duffy, a passenger in the van, was partially ejected through the passenger side window and crushed by the van when it turned over after the collision. At the time, he was not wearing the seat belt Ford had installed in the van in compliance with Standard 208.

Pokorny originally brought her action against Ford in a Pennsylvania state court. The complaint asserted numerous claims of negligence, strict liability and breach of implied warranties, all based on Ford's failure to install an appropriate passive restraint system for passengers in the 1981 van. Since there was diversity between the parties, the case was removed to the United States District Court for the Eastern District of Pennsylvania upon Ford's motion.

In the district court, Ford moved for summary judgment on all counts. It asserted that Pokorny's action was both expressly and impliedly pre-empted by the Safety Act and Standard 208. To support its claim of express pre-emption, Ford relied heavily on the pre-emption provision of the Safety Act, 15 U.S.C.A. § 1392(d) (West Supp.1990). That subsection provides (in relevant part):

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to

> establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

Ford pointed out that the van in question contained combined lap and shoulder safety belts with a warning light and buzzer, one of the options enumerated in federal Standard 208.[3] Alternately, Ford argued that allowing Pokorny's action to proceed and exposing it to possible liability for its failure to install a passive restraint system created an actual conflict with the federal regulatory requirements that clearly gave automobile manufacturers the choice to install either manual safety belts or passive restraints. Therefore, according to Ford, Pokorny's common law action was also impliedly pre-empted by federal

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[3] For 1981 model year passenger cars, Standard 208 requires automobile manufacturers to provide one of three types of occupant restraint systems. Standard 208 requires either: (1) an automatic system to protect passengers from both frontal and lateral crashes; (2) an automatic system designed to protect against frontal crashes, in combination with seat belts and a warning system; or (3) manual lap and shoulder belts with a seat belt warning system. *See* 49 C.F.R. § 571.208, S4.1.2. Manufacturers of 1981 multipurpose passenger vehicles with a gross vehicle weight rating of 10,000 pounds or less are given the same safety options as manufacturers of passenger cars, but they can also comply with Standard 208 by choosing one of two closely analogous options: (1) a complete automatic protection system, or (2) a manual seat belt system. *See id.*, S4.2.1.

regulation.

Pokorny responded to Ford's arguments by relying on the savings clause of the Safety Act, 15 U.S.C.A. § 1397(k) (West Supp.1990).[4] This subsection provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." *Id.* Pokorny argued that § 1397(k)'s language demonstrates that Congress did not intend the Safety Act, or any federal standards promulgated under it, to expressly pre-empt common law actions alleging liability for defectively designed vehicles. In addition, she argued that the cautious approach that federal courts should take in pre-emption matters precluded implied pre-emption of her action because there was no actual conflict between her theory of recovery and the options presented in Standard 208.

The district court concluded that Pokorny's action created an actual conflict with the options given to automobile manufacturers by the Safety Act and Standard 208. The court recognized that Standard 208 was specifically designed to give automobile manufacturers a degree of flexibility and choice in providing passenger restraint systems. It reasoned that allowing Pokorny's suit to go forward and exposing Ford to possible liability for failing to install a passive restraint system in the 1981 Ford van would, in effect, eliminate that flexibility and choice. Thus, the district court held that Pokorny's action was impliedly pre-empted by the Safety Act and Standard 208, and it granted Ford's motion for summary judgment on all counts.

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[4] The savings clause was formerly codified at 15 U.S.C.A. § 1397(c) (West 1982).

See Pokorny v. Ford Motor Co., 714 F.Supp. 739, 742–43 (E.D.Pa.).[5]

Pokorny now appeals the district court's judgment to this Court. We have appellate jurisdiction pursuant to 28 U.S.C.A. § 1291 (West Supp.1990). We exercise plenary review because the question of whether Pokorny's action is pre-empted by the Safety Act and Standard 208 arose during summary judgment proceedings and the resolution of that question involves a pure question of law. *See International Union, United Mine Workers v. Racho Trucking Co.*, 897 F.2d 1248, 1252 (3d Cir.1990).

II.

In *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), the Supreme Court recognized that federal pre-emption of state law can occur in three types of situations: where Congress explicitly pre-empts state law, where pre-emption is implied because Congress has occupied the entire field and where pre-emption is implied because there is an actual conflict between federal and state law.

> A pre-emption question requires an examination of congressional intent. Of course, Congress explicitly may define the extent to which its enactments preempt state

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[5] Because the district court granted summary judgment to Ford on this ground, it did not consider other pre-emption arguments made by Ford, including its express pre-emption argument. *See Pokorny*, 714 F.Supp. at 742.

> law. In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of the obligations imposed by it ... reveal the same purpose." Finally, even where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found " 'when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.' "

Id. at 299-300 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 *rev'd*, 331 U.S. 247 (1947), and *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987)) (citations omitted).

A.

Initially, Ford contends that Pokorny's common law action is expressly pre-empted by § 1392(d), the pre-emption provision of the Safety Act. Ford notes that Standard 208, with its three basic options, defines the federal safety standard for passenger-side passive restraint

systems. Therefore, it argues, § 1392(d) mandates that no state, and no political subdivision of a state, may establish a safety standard on this aspect of performance that differs in any way from the requirements of federal Standard 208. According to Ford, exposure to possible liability under state common law because of the absence of passive restraint systems for passengers has the effect of establishing a state standard within the meaning of § 1392(d), and thus such common law liability is expressly pre-empted if it is not identical to the requirements of Standard 208.

Ford's argument that Pokorny's common law action is expressly pre-empted by the Safety Act and Standard 208 is unconvincing, primarily because it focuses on one provision of the Safety Act, § 1392(d), without giving adequate consideration to the Act's savings clause, § 1397(k). The question of express pre-emption is properly analyzed only after considering both § 1392(d) and § 1397(k). *See American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 513 (1981) ("all parts of a statute, if possible, are to be given effect"); *Taylor v. General Motors Corp.*, 875 F.2d 816, 824 (11th Cir.1989) (courts have a duty to give effect to every clause of a statute, if possible), *cert. denied*, __ U.S. __, 110 S.Ct. 1781 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395, 420 (1st Cir.1988) (Selya, J., dissenting) (in construing statutes, court's role is to give effect to them as written and as a whole, not to enforce one section at the expense of another), *cert. denied*, 58 U.S.L.W. 3626 (Apr. 2, 1990)(No. 89-46) [110 S.Ct. 1781 (1990)].

The cases that Ford cites in support of its arguments on express pre-emption--*Cox v. Baltimore County*, 646 F.Supp. 761, 763 (D.Md.1986); *Vanover v. Ford Motor Co.*, 632 F.Supp. 1095, 1096-97 (E.D.Mo.1986); and *Wickstrom*

v. Maplewood Toyota, Inc., 416 N.W.2d 838, 840 (Minn.Ct.App.1987), *cert. denied*, [487 U.S. 1236,] 108 S.Ct. 2905 (1988)--fail to give adequate weight to the effect of the savings clause on the question of express pre-emption. When we consider § 1397(k) together with § 1392(d), we conclude that Congress did not intend all common law actions for design defects like Pokorny's to be expressly pre-empted by federal regulations like Standard 208.

Ford, however, argues that § 1397(k) should be construed narrowly, since its limited purpose is to express Congress's intent not to pre-empt the entire field of automobile safety. In other words, according to Ford, § 1397(k) was enacted to ensure only that state common law continues to exist where no federal safety standard has been promulgated.

Ford's construction undermines the express language of § 1397(k). Section 1397(k) specifically recognizes that compliance with a particular federal safety standard, like Standard 208, does not exempt Ford from common law liability. *See Dawson v. Chrysler Corp.*, 630 F.2d 950, 958 (3d Cir.1980), *cert. denied*, 450 U.S. 959 (1981). The savings provision cannot be limited to matters not covered by the federal standards. We reject Ford's argument on this point and are not persuaded by the few district court opinions that have accepted it. *See, e.g., Cox*, 646 F.Supp. at 764. The language of § 1397(k) does not reasonably support that narrow construction. *See Taylor*, 875 F.2d at 824 ("Such a construction ... would render the savings clause a mere redundancy since the preemption clause itself provides that where a federal standard does not govern 'the same aspect of performance' as the state standard, the state

standard is not preempted.").[6]

We also note that § 1392(d), the pre-emption provision, does not specifically mention common law liability. In the pre-emption clauses of many other statutes, Congress has explicitly referred to common law actions when it wished to pre-empt them. *See Taylor*, 875 F.2d at 824-25; *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 185-86 (3d Cir.1986), *cert. denied*, 479 U.S. 1043 (1987); *Kolbeck v. General Motors Corp.*, 702 F.Supp. 532, 537 (E.D.Pa. 1988) (§ 1392(d) only prohibits states from implementing their own safety standards; it does not directly address state common law).

Nevertheless, Ford argues that our construction of § 1397(k) is inconsistent with § 1392(d) because common law liability has the same effect on automobile manufacturers as the other kinds of state regulation that are expressly pre-empted by § 1392(d). Although we recognize that common law damages may have an effect on automobile manufacturers similar to other safety standards established by states through statutory or regulatory processes, common law liability and state regulation have important differences.

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[6] We are also unpersuaded by the narrow construction given to the savings clause by the United States Court of Appeals for the First Circuit in *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1989), *cert. denied* 58 U.S.L.W. 3626 (Apr. 2, 1990)(No. 89-46) [110 S.Ct. 1781 (1990)]. There, the First Circuit, over Judge Selya's dissent, held that Congress did not foresee lawsuits claiming design defects when it enacted § 1397(k), and hence that section should not be construed to "save" such common law actions. *See* 865 F.2d at 402, 407.

See Gingold v. Audi-NSU-Auto Union, A.G., 389 Pa.Super. 328, 567 A.2d 312, 321-22 (1989); *Wood*, 865 F.2d at 423-24 (Selya, J., dissenting). Ford's hypothesis about the economic effect of common law liability is a question more properly addressed to Congress than to a court. The judiciary must adhere to the framework Congress designed when it enacted the Safety Act. As we construe that Act, common law liability survives federal regulation, even in those areas where federal safety standards have actually been established. Pokorny's common law action is not expressly pre-empted by § 1392(d).

B.

In the alternative, Ford contends that Pokorny's action is impliedly pre-empted by the Safety Act and Standard 208 because the possibility of common law liability "would stand as an obstacle to the full accomplishment and execution of the federal purposes articulated by Congress and the Department of Transportation," Brief for Appellee at 13, and therefore would create an actual conflict with the flexible approach to passenger safety specifically established by federal law.[7]

It is well-established that federal law may impliedly pre-empt state law to the extent that the state law conflicts

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[7] Ford concedes that the third type of pre-emption discussed in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), is not applicable here, since § 1397(k) demonstrates that Congress did not intend to occupy the entire field of motor vehicle safety. We agree that Pokorny's common law action cannot be pre-empted on this basis.

with a federal regulatory scheme. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 490–92 (1987); *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984). A federal regulation may have just as much pre-emptive effect as a federal statute. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Moreover, common law liability may create a conflict with federal law, just as other types of state law can. *See Taylor*, 875 F.2d at 826; *Cipollone*, 789 F.2d at 187. However, there is generally a presumption against pre-emption. *See Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Therefore, state law must create an actual conflict with a federal regulatory scheme before it is impliedly pre-empted.

1.

Before we determine whether, and to what extent, an actual conflict exists between federal law and the common law liability asserted by Pokorny, we address a few preliminary matters the parties raise in this appeal. First, despite Pokorny's arguments to the contrary, our decision in *Dawson* does not prohibit us from holding that Pokorny's common law action is impliedly pre-empted by the Safety Act and Standard 208. While *Dawson* held that an automobile manufacturer's compliance with federal safety standards could not be used as a defense foreclosing the possibility of finding that an automobile was defectively designed, *see* 630 F.2d at 957–58, that decision did not involve pre-emption. *Cf. Wood*, 865 F.2d at 401 n. 8. There was no federal standard governing the particular design said to be defective in *Dawson*, and thus there was no asserted conflict between federal standards and common law liability.

On the other hand, we cannot agree with Ford's suggestion that Pokorny's entire action should be dismissed because any other result would conflict with the Safety Act's goal of national uniformity in motor vehicle safety requirements. Certainly Congress was concerned with providing uniform safety standards while enacting the Safety Act. Evidence of this concern appears in § 1392(d), which prohibits state safety standards not identical to federal standards, and in selected passages of the Act's legislative history. *See, e.g.*, S.Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S.Code Cong. & Admin.News 2709, 2720.

However, uniformity was not Congress's primary goal in enacting the Safety Act. In 15 U.S.C.A. § 1381, Congress declared that the Safety Act's purpose was "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." Congress evidently thought that preserving common law liability would further the goal of motor vehicle safety, since § 1397(k) was included as part of the Act. *See Gingold*, 389 Pa.Super. at __, 567 A.2d at 328–29. In the face of this clear declaration of congressional purpose, we are unwilling to accept an overly broad notion of pre-emption based on uniformity that could have the effect of undercutting Congress's concern for safety. *See Kolbeck*, 702 F.Supp. at 539. We prefer to analyze the pre-emption issue in a more cautious and precise manner, allowing pre-emption of Pokorny's action only where it presents an actual, clear conflict with federal regulation. *See Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, [489 U.S. 493], 109 S.Ct. 1262, 1276 (1989) ("[C]onflict-pre-emption analysis must be applied sensitively ... to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role.").

2.

So analyzed, we conclude that Pokorny's action does present an actual conflict with the Safety Act and Standard 208 to the extent that it alleges liability for Ford's failure to include air bags or automatic seat belts on the passenger side of the 1981 van in which Duffy was killed. As the district court correctly recognized, Standard 208 was specifically designed to give automobile manufacturers a choice among several options when providing restraint systems for passengers. The van in which Duffy was killed contained manual safety belts and a buzzer system, one of Standard 208's options.

Allowing Pokorny to assert that the Ford van was defectively designed because it did not contain air bags or automatic seat belts frustrates the goals of the federal regulatory framework and undermines the flexibility that Congress and the Department of Transportation intended to give to automobile manufacturers in this area. Because potential common law liability interferes with the regulatory methods chosen by the federal government to achieve the Safety Act's stated goals, we think Pokorny's action is pre-empted to the extent that she alleges that the Ford van was defectively designed because it lacked air bags or automatic seat belts. *See Ouellette*, 479 U.S. at 494.

The conflict between possible common law liability for failing to install air bags or automatic seat belts and the federal regulatory framework established pursuant to the Safety Act becomes clearer when we consider 15 U.S.C.A. § 1410b (West 1982). Congress enacted § 1410b as part of the Motor Vehicle and Schoolbus Safety Amendments of 1974, *see* Pub.L. No. 93-492, § 109, 88 Stat. 1470, in

direct response to the simmering controversy over safety belt interlock systems and certain proposed passive restraint requirements. *See* H.R.Rep. No. 1191, 93rd Cong., 2d Sess. 28–30 (1974), reprinted in 1974 U.S.Code Cong. & Admin.News 6046, 6073–75; Conf.Rep. No. 1452, 93rd Cong., 2d Sess. 25 (1974), reprinted in 1974 U.S.Code Cong. & Admin.News 6084, 6108. Apparently there was significant concern among motorists that certain types of passive safety systems, most particularly air bags and automatic seat belts, could become mandatory in motor vehicles and that motor vehicles' ignitions soon would be designed not to start unless the occupants' seat belts were connected. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34–37 (1983).

In § 1410b, Congress addressed these concerns. It preserved manual seat belts as a continuing option for occupant restraint systems by providing that:

> (2) Except as otherwise provided in paragraph (3), no Federal motor vehicle safety standard respecting occupant restraint systems may--
>
> (A) have the effect of requiring, or
>
> (B) provide that a manufacturer is permitted to comply with such standard by means of, an occupant restraint system other than a belt system.
>
> (3) (A) Paragraph (2) shall not apply to a Federal motor vehicle safety standard which provides that a manufacturer is permitted to comply

> with such standard by equipping motor vehicles manufactured by him with either--
>
> (i) a belt system, or
>
> (ii) any other occupant restraint system specified in such standard.

15 U.S.C.A. § 1410b(b) (in relevant part).[8]

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[8] "Belt system" for these purposes was defined as "an occupant restraint system consisting of integrated lap and shoulder belts for front outboard occupants and lap belts for other occupants." 15 U.S.C.A. § 1410b(f)(2).

In § 1410b, Congress did provide a way to circumvent the limitations it had established in subsections (b)(2) and (b)(3)(A). A safety standard could be promulgated that conflicted with subsections (b)(2) or (b)(3)(A) if certain procedural requirements were followed during its promulgation. *See* §§ 1410b(b)(3)(B), 1410b(c). The key procedural requirement in these situations was congressional notification, which would allow both Houses of Congress to consider the proposed standard and determine whether it should become effective. If both Houses passed concurrent resolutions disapproving of the proposed standard, then the standard was to be ineffective. *See* § 1410b(d)(1). Of course, after the Supreme Court's holding in *INS v. Chadha*, 462 U.S. 919 (1983), the "congressional veto" scheme devised in § 1410b is no longer available. However, Congress's inclusion of such a check in § 1410b reinforces the inference that it remained wary about safety standards

(continued...)

Section 1410b shows, inter alia, that Congress intended manual seat belts to remain one of the options for complying with federal restraint system requirements, *see Taylor*, 875 F.2d at 826–27, at least insofar as the procedures in subsection (c) were not used to circumvent subsections (b)(2) and (b)(3)(A). The options presented by the Department of Transportation in Standard 208 reflect congressional intent, since they allow automobile manufacturers to comply with federal safety requirements by providing either a passive safety system, such as air bags or automatic seat belts, or manual safety belts.

That such flexibility and choice is an essential element of the regulatory framework established in Standard 208 has repeatedly been made clear in the regulatory history of this particular safety standard. *See, e.g.*, 49 Fed.Reg. 28962, 28997 (1984) (Secretary Dole explained that the flexibility and variety built into Standard 208 was needed to "provide sufficient latitude for industry to develop the most effective [occupant restraint] systems" and to help "overcome any concerns about public acceptability by permitting some public choice"); 46 Fed.Reg. 53419 (1981) (Secretary Lewis determined that air bags and automatic seat belts should not be required, but each should remain only one alternative among several options in satisfying occupant restraint requirements); 42 Fed.Reg. 5071 (1977) (Secretary Coleman relied on a 1976 document entitled "The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection" to conclude that passive restraint systems should not be mandated at the

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[5](...continued)

that did not include an option for manual safety belts.

time due to public uncertainty). The regulatory history shows that the Department of Transportation, consistent with Congress's intent in § 1410b, rejected the idea that air bags or automatic seat belts should become a mandatory requirement for occupant safety at the time this Ford van was manufactured. *See, e.g.*, 49 Fed.Reg. 29000 (1984) (Department of Transportation "determined that airbags should not be required in all cars"); 42 Fed.Reg. 5071 (1977) (after considering several alternate approaches to occupant safety under Standard 208, Secretary of Transportation rejected alternatives "mandat[ing] passive restraints on some or all passenger cars" and continued with approach allowing use of manual seat belts).[9]

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[9] More recently, the Department of Transportation has taken some steps to slowly phase in automatic restraint system requirements for passenger cars manufactured after 1986. See 49 C.F.R. § 571.208, S4.1.3–4.1.4 (1989). However, until September 1993, manufacturers may continue to provide manual seat belts on the passenger's side of vehicles that have air bags on the driver's side. *See id.*, S4.1.4. Moreover, until April 1, 1989, it was unclear whether the automatic restraint system requirements would become effective, since the Secretary of Transportation was authorized to eliminate the requirements if enough states passed mandatory seat belt use laws. *See id.*, S4.1.5. The requirements themselves are limited to passenger cars and do not apply to multipurpose vehicles.

Despite this evolution, we remain convinced that both Congress and the Department of Transportation did not want to mandate the use of air bags or automatic safety belts when Ford manufactured this Econoline Van in 1981.

Allowing Pokorny, and others in similar situations, to allege common law liability for the failure to install air bags or automatic safety belts would directly undermine the regulatory framework suggested by Congress in § 1410b and implemented by the Department of Transportation in Standard 208. These aspects of Pokorny's common law action are pre-empted. *See Taylor*, 875 F.2d at 827 (Eleventh Circuit applied holding of *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), that "a state common law rule cannot take away the flexibility provided by a federal regulation, and cannot prohibit the exercise of a federally granted option"; since plaintiffs' theory of recovery, based on manufacturers' failure to equip certain motor vehicles with air bags, effectively would remove the element of choice provided in Standard 208, plaintiffs' actions were impliedly pre-empted); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir.1989) (plaintiffs' air bag claims impliedly pre-empted by Safety Act), *cert. denied*, 58 U.S.L.W. 3626 (Apr. 2, 1990)(No. 89-279) [110 S.Ct. 1781 (1990)]; *Wood*, 865 F.2d at 402, 408-14 (defective design action based on lack of air bags in motor vehicle impliedly pre-empted); *Kolbeck*, 702 F.Supp. at 541-42 (although an "extremely close issue," court held that Safety Act and Standard 208 pre-empted common law damage claim for failure to provide a passive occupant restraint system); *Nissan Motor Corp. v. Superior Court (Meier)*, 212 Cal.App.3d 980, 261 Cal.Rptr. 80 (Ct.App.1989), *cert. denied*, 58 U.S.L.W. 3626 (Apr. 2, 1990)(No. 89-940) [110 S.Ct. 1782 (1990)].

The Safety Act's savings clause does not change our resolution of the pre-emption issue, since it is well-established that a savings clause like § 1397(k) does not "save" common law actions that would subvert a federal statutory or regulatory scheme. *See Ouellette*, 479 U.S. at

492–94; *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328–31 (1981); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).[10]

Pokorny's assertion that there is no actual conflict between federal law and the imposition of common law liability for failing to provide air bags or automatic safety belts is unconvincing. A few courts have held that there is no conflict between Standard 208 and common law liability in this type of situation since common law liability would not compel automobile manufacturers to install certain types of passive restraints and, in any event, it is possible for them to meet both federal and state requirements; for

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[10] On this issue, we do not find the analysis in *Gingold v. Audi–NSU–Auto Union, A.G.*, 389 Pa.Super. 328, __, 567 A.2d 312, 324–27 (1989), persuasive. In *Gingold*, the Pennsylvania Superior Court concluded that the Safety Act's savings clause permitted an action for design defect based on the lack of any type of passive restraint system, even though it appeared to conflict, at least in part, with the Act and Standard 208. That court determined that there could be no conflict between the federal regulatory scheme and possible common law liability in such a situation, since it construed § 1397(k) to preserve an individual's common law remedies without limitation. However, because of the actual conflict that exists between Standard 208 and common law actions based on the absence of air bags or automatic safety belts, we believe the better approach is to construe § 1397(k) to permit only those common law actions for design defect that do not frustrate or undermine the Safety Act's regulatory framework.

example, a manufacturer could install air bags or automatic seat belts. *See, e.g., Gingold*, 389 Pa.Super. at __, 567 A.2d at 325–27. However, we think that *Kolbeck* is more attuned to the realities of such a situation: "'An automobile manufacturer faced with the prospect of choosing the [passive restraint options], or facing potential exposure to compensatory and punitive damages for failing to do so, has but one realistic choice.'" 702 F.Supp. at 541 (quoting *Baird v. General Motors Corp.*, 654 F.Supp. 28, 32 (N.D. Ohio 1986)). Because common law liability for failing to provide passenger-side air bags or automatic seat belts would undermine the option of meeting federal safety standards by providing a manual seat belt system like that in the Ford van in which Duffy was killed, an option that Congress and the Department of Transportation clearly intended to preserve, Pokorny's action is pre-empted to the extent that it is based on this theory of recovery.

3.

We think Pokorny's action is not pre-empted, however, to the extent that it asserts liability for Ford's failure to provide protective netting over the van's windows. Potential liability for this type of passive system, unlike liability for failing to provide air bags or automatic seat belts, presents no direct, actual conflict with Standard 208's regulatory framework. It does not take away the flexibility established by the federal scheme, and it does not have the effect of prohibiting an option granted by Congress or the Department of Transportation. *Cf. de la Cuesta*, 458 U.S. at 154–56 (state court limitations on federal savings and loan's ability to enforce due-on-sale clauses deprived lender of flexibility given to it by the Federal Home Loan Bank Board and conflicted with Board's express policy on such

clauses). Because of the significant difference between common law liability predicated on the failure to provide air bags or automatic seat belts and liability based on the absence of protective window netting or other possible non-conflicting designs reasonably adapted to increase passenger safety, Ford's argument that we should not make a distinction among particular types of passive restraints and should simply hold that all safety alternatives not included in Standard 208 are pre-empted does not persuade us.[11]

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[11] We recognize that other courts addressing similar questions on pre-emption in the context of the Safety Act and Standard 208 have not made the distinction among passive systems that we make here. However, most of those cases involved only the pre-emption of common law actions based on the failure to include air bags. *See, e.g., Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir.1989), *cert. denied*, 58 U.S.L.W. 3626 (Apr. 2, 1990)(No. 89-852) [110 S.Ct. 1781 (1990)]; *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir.1989), *cert. denied*, 58 U.S.L.W. 3626 (Apr. 2, 1990)(No. 89-279) [110 S.Ct. 1781 (1990)]; *Wood v. General Motors Corp.*, 865 F.2d 395, 396-97 (1st Cir.1988) (although plaintiff's complaint alleged a defective design since General Motors "failed to provide reasonably safe and adequate safety devices, which include but are not limited to 'air bag' devices," the First Circuit limited its review to "whether federal law preempts a state law product liability claim against a motor vehicle manufacturer based on its installing seat belts, rather than airbags, in a motor vehicle"), *cert. denied*, 58 U.S.L.W. 3626 (Apr. 2, 1990)(No. 89-46) [110 S.Ct. 1781 (1990)]. *But see Kolbeck v. General Motors Corp.*, 702 F.Supp. 532, 534 (E.D.Pa.1988)

(continued...)

A state's common law, imposing liability because the absence of protective window netting is a design defect, would not, to our mind, frustrate the purpose of the federal regulatory scheme. The options set forth in Standard 208 would not be undermined in such a situation, and manual safety belts in particular would remain a viable option. Common law liability simply would "encourage" automobile manufacturers to provide safety features in addition to those listed in Standard 208.

Congress clearly expressed its main purpose as promoting safety when it enacted the Safety Act. *See* typescript *supra*, at 14–15 (discussing 15 U.S.C.A. § 1381). Our result is consistent with that purpose and with the federal regulatory scheme established pursuant to the Safety Act. We do not think that Congress or the Department of Transportation intended to "freeze" motor vehicle safety design with either the Safety Act or Standard 208. Therefore, we will not use the pre-emption doctrine in a manner that would have that effect. Thus, we hold that Pokorny's claim against Ford for defective design in failing to include protective netting over the windows is not pre-empted.

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[11](...continued)

(finding pre-emption where plaintiff's claim asserted defective design because of the absence of a "passive restraint system such as airbags, an energy absorbing interior, or automatic seat belts"). Here, we think that it is proper to examine each aspect of Pokorny's action independently to determine whether it is pre-empted by the Safety Act and Standard 208.

III.

For the foregoing reasons, the district court's order granting summary judgment to Ford will be affirmed in part and reversed in part. To the extent that Pokorny's action is based on the lack of air bags or automatic safety belts in the 1981 Ford van, it is pre-empted by the Safety Act and Standard 208. To the extent that it is based on the absence of protective netting over the van's windows, however, it is not pre-empted because there is no actual conflict with the federal regulatory scheme. We will remand to the district court for further proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Pokorny v. Ford Motor Co., 714 F.Supp. 739 (E.D.Pa. 1989)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 85–6544

Anne Duffy POKORNY, administratrix
of the Estate of John Duffy

v.

FORD MOTOR COMPANY

June 8, 1989.

MEMORANDUM

O'NEILL, District Judge

Plaintiff Anne Duffy Pokorny brought this action as administratrix of the estate of her brother John Duffy, asserting claims of common law negligence, strict liability and breaches of implied warranties against defendant Ford Motor Company.[1] Duffy died from injuries he suffered while a passenger in a 1981 Ford Econoline van. Pokorny alleges that Ford's failure to equip the van with passive restraining devices caused Duffy's death. Ford has moved

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[1] Suit was commenced in the Court of Common Pleas of Philadelphia County; thereafter, Ford removed the action to this Court. Pokorny is a Pennsylvania citizen, and Ford is a Delaware corporation whose principal place of business is in Michigan.

for summary judgment, arguing that Pokorny's claims are preempted by the National Traffic and Motor Vehicle Safety Act ("Safety Act"), 15 U.S.C. § 1381 *et seq.*, and Federal Motor Vehicle Safety Standard 208 ("FMVSS 208"), 49 C.F.R. § 571.208. Because I adopt the reasoning of my colleague Judge Huyett in *Kolbeck v. General Motors Corp.*, 702 F.Supp. 532, 542 (E.D.Pa.1988) (holding "that the Safety Act and FMVSS 208 preempt a common law damage claim for failing to include a passive occupant restraint system"), I will grant Ford's motion for summary judgment.

Background

On December 10, 1983, John Duffy, in the course of his duties as a Philadelphia police officer, was a passenger in a 1981 Ford Econoline police van driven by another police officer, James R. Coughlin. While responding to an emergency call, the van collided with a police patrol car also answering the call. The van spun, hit a mailbox, and rolled over on its right side. Duffy, who was not wearing a seat belt, was partially ejected through the open passenger side window and was crushed by the van.

The City of Philadelphia purchased the van in question for use as a police patrol and transport vehicle. Ford equipped the van with combined lap and shoulder safety belts and a warning light and buzzer in compliance with FMVSS 208. The van did not contain netting over the windows, airbags or any other passive occupant restraining device.

Discussion

F.R.C.P. Rule 56(c) provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Pokorny's sole theory of recovery is that Ford's failure to equip the van with passive restraining devices caused Duffy's death.[2] Ford contends that it is entitled to judgment as a matter of law because federal statutes and regulations have preempted state tort law claims against automobile manufacturers for failure to provide passive occupant restraint systems.

The Supreme Court recently reviewed the circumstances under which federal statutes or regulations preempt state regulation in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988):

> A pre-emption question requires an examination of congressional intent. Of course, Congress explicitly may define the extent to which its enactments pre-empt state law. In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose

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[2] Although the Complaint asserts numerous claims of negligence, strict liability and implied warranties, all of these claims are based on Ford's failure to provide a passive occupant restraint system.

> properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where the object sought to be obtained by the federal law and the character of obligations imposed by it reveal the same purpose. Finally, even where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. (citations and quotations omitted)

In addition, "state law is also preempted if it interferes with the methods by which the federal statute was designed to reach [the stated goals of the statute]." *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Where these circumstances are present, federal law preempts conflicting state regulation in the form of either statutes or common law liability. *See, e.g., Ouellette*, 479 U.S. at 481, 107 S.Ct. at 806 (holding that the Clean Water Act preempts the common law of a state affected by pollution to the extent that the common law seeks to impose liability on a pollution point source in another state); *San Diego Unions v. Garmon*, 359 U.S. 236, 247 (1959) ("Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.").

Ford argues that Pokorny's state law claims are preempted by the Safety Act and FMVSS 208. In 15 U.S.C. § 1381, Congress declares that the purpose of the Safety Act "is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." The Safety Act provides at 15 U.S.C. § 1392(d) that

> [w]henever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

FMVSS 208, which was first adopted in 1967 and was in effect at all times relevant to this action, establishes federal safety standards for automobile occupant restraint systems. The stated purpose of this regulation is "to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements ... [and] equipment requirements for active and passive restraint systems." 49 C.F.R. § 571.208 S2. For vehicles manufactured between September 1, 1973 and September 1, 1986, FMVSS 208 requires that the manufacturer provide one of three different occupant restraint systems: the "First option", a passive restraint system designed to protect occupants automatically from frontal and lateral crashes; the "Second option", a combination of passive restraints designed to protect occupants automatically from frontal crashes and seat belts with a warning system; the "Third option", seat belts with a warning

system. 49 C.F.R. § 571.208 S4.1.2.1–S4.1.2.3.

Ford contends that Pokorny's claims are expressly preempted by 15 U.S.C. § 1392(d), and impliedly preempted because, if recognized, they would frustrate the purpose of the Safety Act to establish uniform national automobile safety standards, as well as the policy, embodied in 15 U.S.C. § 1410b(b)–(d), of permitting requirement of passive occupant restraint systems only upon approval of Congress.[3] A number of federal courts have addressed these issues, but they have reached various conclusions: express preemption, implied preemption, or no preemption.[4]

I need not address these contentions, however, as Ford also argues that Pokorny's claims are preempted because they interfere with the method by which FMVSS 208 was intended to operate, *i.e.* permitting the manufacturer to choose one of three occupant restraint system options. According to Ford, state common law liability for failure to provide passive restraints "would deprive manufacturers of the flexibility that the Department of Transportation explicitly found necessary to 'provide sufficient latitude for industry to develop the most effective [passive-restraint] systems ....' 49 Fed.Reg. 28962, 28977 (July 17, 1984)." Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment, at 20. Judge Huyett addressed this issue in *Kolbeck*, where the defendant manufacturer also contended "that FMVSS 208 was specifically designed to provide manufacturers with a

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[3] *See* Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment, at 12–21.

[4] *See* cases cited in *Kolbeck*, 702 F.Supp. at 534, n. 1.

choice among restraint system alternatives." *Kolbeck*, 702 F.Supp. at 541.

Judge Huyett found that "[t]he prospect of common law damage awards for failing to choose the passive restraint alternatives removes the element of choice expressly authorized in FMVSS 208." As a result, he held that

> [p]laintiff's passive restraint claim would tip the carefully drawn balance of [the Safety Act's] purposes by foreclosing options in favor of common law damage awards. *Cf. Cipollone*, [*v. Liggett Group, Inc.*] 789 F.2d [181] at 187 [3rd Cir.1986]. Thus, the effect of plaintiff's passive restraint claim interferes with the methods by which the federal statute was designed to reach [the primary] goal,' *Ouellette* [479 U.S.] at 494, 107 S.Ct. at 813, to an extent sufficient to overcome the presumption against preemption. 702 F.Supp. at 541.

I adopt the reasoning of *Kolbeck*, and therefore find that Pokorny's claims are impliedly preempted by the Safety Act and FMVSS 208.[5]

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[5] The Safety Act also contains a savings clause, which provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(c). I am aware that some courts have relied on this savings clause in holding that the Safety Act cannot preempt state tort law liability for

(continued...)

Pokorny suggests that general preemption principles should not apply in this case because the van was sold to the City of Philadelphia for use as a police vehicle: "[e]ven if the Federal Safety Standards were to preempt state common law with respect to general purpose motor vehicles, it does not follow at all that such a preemption principal [sic] should be applied where, as here, the vehicle is intended for special uses not necessarily or specifically within the contemplation of the Act or the Safety Standards promulgated pursuant thereto." Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, at 12. But Pokorny cites no law in support of this proposition. Moreover, 15 U.S.C. § 1392(d) specifically authorizes the City of Philadelphia to require passive

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[5](...continued)

failure to provide passive restraints. *See Richart v. Ford Motor Co.*, 681 F.Supp. 1462 (D.N.M.1988); *Baird v. General Motors Corp.*, 654 F.Supp. 28 (N.D.Ohio 1986). But I am persuaded to follow the reasoning of *Kolbeck*, 702 F.Supp. at 541, n. 13, and of the Court of Appeals for the First Circuit in *Wood v. General Motors Corp.*, 865 F.2d 395, 414–416 (1st Cir.1988) (dismissing argument that savings clause forecloses implied preemption because "the ambiguity created by section 1392(d) in combination with the savings clause, combined with the paucity of design defect suits at the time the Safety Act was passed, leads us to conclude that Congress would have intended to preempt any state standard like this (even though established through the medium of a design lawsuit rather than by a state regulation) that, in the parlance of implied preemption analysis, 'actually conflict[s]' with the Safety Act.").

restraints in vehicles purchased for its own use,[6] and thus expressly contemplates that "special use vehicles" are subject to the Safety Act and Safety Standards unless the governmental entity purchasing the vehicles chooses to impose a more stringent standard. Pokorny offers no evidence that the City has ever required manufacturers to install or provide passive restraints in police vehicles pursuant to § 1392(d). As a result, the van in question was required to conform to the requirements of the Safety Act and FMVSS 208, and, as in Kolbeck, plaintiff's state law claims regarding passive restraint systems are impliedly preempted.

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[6] § 1392(d) provides, in relevant part: "[n]othing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard."

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANNE DUFFY POKORNY,	:	Civil Action
Administratrix of the	:	No. 85-6544
Estate of John Duffy,	:	
Deceased	:	
	:	
v.	:	
	:	
Ford Motor Company	:	

ORDER

AND NOW, this 8th day of June, 1989, upon consideration of defendant's motion for summary judgment, and of the supporting and opposing memoranda, it is hereby ORDERED that said motion is GRANTED. Judgment is entered against plaintiff and in favor of defendant.

/s/ Thomas N. O'Neill, Jr., J.

ORDER

AND NOW, this 5th day of July, 1989, it is hereby ORDERED that the Memorandum filed June 8, 1989 be AMENDED as follows:

1. The third sentence of footnote 5, page 7 ("See Richart v. Ford Motor Co., 681 F. Supp. 1462 (D.N.M. 1988); Garrett v. Ford Motor Co., 684 F. Supp. 407 (D.Md. 1987).") be replaced by: "See Richart v. Ford Motor Co., 681 F. Supp. 1462 (D.N.M. 1988); Baird v. General Motors Corp., 654 F. Supp. 26 (N.D.Ohio 1986)."

/s/ Thomas N. O'Neill, Jr., J.

§ 571.208 Standard 208; Occupant Crash Protection

S1. Scope. This standard specifies performance requirements for the protection of vehicle occupants in crashes.

S2. Purpose. The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured, on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.

S3. Application. This standard applies to passenger cars, multipurpose passenger vehicles, trucks and buses.

* * * *

S4. General requirements.

S4.1 Passenger cars.

* * * *

S4.1.2 Passenger cars manufactured on or after September 1, 1973, and before September 1, 1986. Each passenger car manufactured on or after September 1, 1973,

and before September 1, 1986, shall meet the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A protection system that meets the requirements of S4.1.2.1 or S4.1.2.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.2.3.

S4.1.2.1 First option -- frontal/angular automatic protection system. The vehicle shall:

(a) At each front outboard designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(b) At the front center designated seating position and at each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2; and

(c) Either (1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehicle occupants; or

(2) At each front outboard designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 through S7.3, and that meets the requirements of S5.1 with front test dummies as required by S5.1, restrained by the Type 1 or Type 2 seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

S4.1.2.2 Second option -- head-on automatic protection system. The vehicle shall --

(a) At each designated seating position have a Type 1 seat belt assembly or Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard;

(b) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and

(d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

S4.1.2.3. Third option -- lap and shoulder belt protection system with belt warning.

S4.1.2.3.1. Except for convertibles and open-body vehicles, the vehicle shall --

(c)(c)(a) At each front outboard designated seating position have a seat belt assembly that conforms to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3. The belt assembly shall be either a Type 2 seat belt assembly with a nondetachable shoulder belt that conforms to Standard No. 209 (§ 571.209), or a Type 1 seat belt assembly such that with a test device restrained by the assembly the vehicle meets the frontal crash protection requirements of S5.1 in a perpendicular impact.

(c)(c)(b) At any center front designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3; and

(c)(c)(c) At each other designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and S7.1 and S7.2 of this standard.

* * * *

S4.2. Trucks and multipurpose passenger vehicles with GVWR of 10,000 pounds or less.

S4.2.2. Trucks and multipurpose passenger vehicles, with GVWR of 10,000 pounds or less, manufactured on or after January 1, 1976. Each truck and multipurpose passenger vehicle, with a gross vehicle weight rating of 10,000 pounds or less, manufactured on or after January 1, 1976, shall meet the requirements of S4.1.2.1 or, at the option of the manufacturer, S4.1.2.2 or S.4.1.2.3 (as specified for passenger cars), ...

* * * *

S4.5.3 Automatic belts. Except as provided in S4.5.3.1, a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as an "automatic belt") may be used to meet the crash protection

requirements of any option under S4 and in place of any seat belt assembly otherwise required by that option.

* * * *

Authority: Secs. 103, 112, 114, 119, Pub. L. 89–563, 80 Stat. 718, 719, 728; 15 U.S.C. 1392, 1401, 1403, 1407; delegation of authority at 49 CFR 1.50, unless otherwise noted.

Source: 36 FR 22902, Dec. 2, 1971, unless otherwise noted.

Supreme Court, U.S.
FILED
AUG 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ANNE DUFFY POKORNY, Administratrix of the Estate of John Duffy, Deceased,
Petitioner,

v.

FORD MOTOR COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review an interlocutory decision of the United States Court of Appeals for the Third Circuit that, consistent with decisions by three other federal courts of appeals and two state appellate courts that this Court has declined to review within the past two years, narrowly holds that federal law preempts state tort law claims which assert that motor vehicles not equipped with airbags or automatic seat belts are for that reason defective.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-174

ANNE DUFFY POKORNY, Administratrix
of the Estate of John Duffy, Deceased,
Petitioner,

v.

FORD MOTOR COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Petitioner's Claim

Petitioner's deceased, Officer Michael Duffy, was the right-front passenger in a 1981 Ford Econoline police van that collided with another vehicle, was knocked over onto its side, and crushed Officer Duffy when he was partially ejected through the passenger side window. Officer Duffy was not wearing the lap/shoulder safety belt provided in the van.

Petitioner Pokorny brought this product liability action against Ford Motor Company, alleging that the police van was defective because it was equipped with manual lap/shoulder seat belts, rather than with some form of passive restraint, such a airbags, automatic seat belts, or window netting.

B. The National Traffic and Motor Vehicle Safety Act

In 1966 Congress enacted the National Traffic and Motor Vehicle Safety Act, which required the Secretary of Transportation to prescribe Federal Motor Vehicle Safety Standards ("Safety Standards") that "meet the need for motor vehicle safety." 15 U.S.C. § 1392(a). Safety Standards protect the public "against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and . . . unreasonable risk of death or injury to persons in the event accidents do occur." 15 U.S.C. § 1391(1).

To ensure that, when the Department of Transportation decides that a federal Safety Standard should govern a particular motor vehicle feature, it will not be undermined by the enforcement of a hodgepodge of state standards addressing the same feature, Congress preempted conflicting state standards by stating:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment, any safety standard applicable to the same aspect of performance of such vehicle or item of equipment, which is not identical to the Federal standard. . . .

15 U.S.C. § 1392(d).

Explaining the need for preemption, the Senate Report emphasized that

> [t]he centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country.

S. Rep. No. 1301, 89th Cong., 2d Sess. 12, *reprinted in* 1966 U.S. Code Cong. & Admin. News 2709, 2720. The House Report similarly stated that

> this preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards.

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966).

C. Federal Regulation of Passive Restraints

For 23 years, pursuant to the Safety Act, the United States Government has pervasively regulated the occupant-restraint systems in vehicles sold in this country. In 1967 the National Highway Traffic Safety Administration of the Department of Transportation adopted Safety Standard 208, requiring the installation of seat belts in all automobiles sold in this country. 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967).

In 1969 the Department of Transportation began to address "passive" occupant-restraint systems—systems that might restrain vehicle occupants automatically. *See* 34 Fed. Reg. 11148 (July 2, 1969). Two devices received the greatest attention: airbags and seat belts that automatically move into place around the occupants as the vehicle doors are closed.

On November 3, 1970, the Department amended Safety Standard 208 to establish testing requirements that would have to be met by some form of passive restraints in cars manufactured in and after the 1974 model year. *See* 35 Fed. Reg. 16927 (Nov. 3, 1970). In 1972 the Department further amended the Safety Standard to provide that cars built before the 1976 model year could have *either* passive restraints *or* manual lap/shoulder belts coupled with an ignition interlock that would prevent starting the vehicle if the belts were not connected. 37 Fed. Reg. 3911 (Feb. 24, 1972).

In 1974 Congress expressly prohibited the Department from requiring any nonbelt restraint system unless the Secretary first (a) followed special hearing procedures

and (b) provided both houses of Congress an opportunity to review the proposed requirements. 15 U.S.C. § 1410b (b)-(d). The statute's purpose was to ensure that only seat belts, and not airbags or interlocks, would be "require[d] of the automobile industry and of the purchasing public . . . ." 120 Cong. Rec. 27815, 27816 (1974). *See also* 120 Cong. Rec. at 27822, 35637.

In 1976, after additional interim rulemaking, Secretary of Transportation William Coleman concluded that passive restraints still should not be required and that manual lap/shoulder belts should be authorized for at least several more years. He also arranged for a multi-year test in which a demonstration fleet of 500,000 vehicles would be equipped with passive restraints beginning in 1979. In explaining his conclusion that passive restraints should not be required until after such a major fleet test had provided real-world data, Secretary Coleman stated:

> Every sampling of public opinion which has been brought to my attention, including the analysis of the docket for the public hearing, indicates that a substantial majority of Americans oppose the Federal government's mandating passive restraints.
>
> * * * *
>
> There is widespread and serious concern among members of the public with respect to the likelihood and consequences of inadvertent air bag deployment, the possibility that air bags may cause or exacerbate injuries, and the question of whether air bags will deploy properly in situations in which they are needed.

"The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection," D.O.T., at 11-12 (Dec. 6, 1976). *See* 42 Fed. Reg. 5071 (Jan. 27, 1977). Secretary Coleman also stated:

> A decision to mandate passive restraints would be unique and of unprecedented magnitude in the history of Federal involvement in motor vehicle safety.

> It would involve replacing seat belts[,] which are effective when used[,] with systems which have operating characteristics unlike any other safety equipment now in automobiles and with which many people are totally unfamiliar. It would mean mandating a particular form of self-protection which (in the case of the air bag) is among the most costly safety devices ever Federally required.

"The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection," D.O.T., at 32.

Secretary Coleman observed that a rule requiring passive restraints would be unfair to automobile owners who use their seat belts, because they would have to pay more for cars with passive restraints, yet would obtain no greater protection. In short, "those who currently wear seat belts would be forced to subsidize those who do not." 41 Fed. Reg. 24070, 24071 (June 14, 1976).

Secretary Coleman concluded that an immediate passive-restraint requirement might provoke "widespread negative public reaction" and lead to a repeal of the standard by Congress "after the manufacturers had retooled their production facilities." Such a result "would have disastrous economic consequences for the entire nation." "The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection," D.O.T., at 11.

In 1977, following additional hearings, Secretary Coleman's successor, Brock Adams, reaffirmed that passive restraints should not be required in any vehicle before the 1982 model year, 42 Fed. Reg. 34290, 34296 (July 5, 1977), and should not be required in multi-purpose vehicles like police vans until an unspecified time after that. *Id.*. Thus, the federal statutes and regulations that governed the 1981 Econoline police van expressly permitted manufacturers to use manual safety belts of the type installed in the vehicle, rather than airbags or other passive restraints.

In July 1984, after further rulemaking and judicial review, Secretary of Transportation Elizabeth Dole promulgated the version of Safety Standard 208 that is still in force today. The rule explicitly authorizes manufacturers to use manual lap/shoulder safety belts, such as those installed in the front seats of the 1981 Ford Econoline van, in all vehicles made before the 1987 model year. 49 Fed. Reg. 28962, 29009-10 (July 17, 1984). It also provided that passive restraints would be phased into passenger cars during the 1987 through 1990 model years, but continued to provide manufacturers the option of using manual seat belts in multi-purpose vehicles, such as police vans, during and after the phase-in period. *Id.* In explaining the bases for this carefully constructed, complex regulatory program, Secretary Dole emphasized federal safety purposes and policies that paralleled those articulated by her predecessors. *See* 49 Fed. Reg. at 28985, 28992, 28997, 29001.

It is against this background—expressly articulated federal safety policies that would be undermined by a passive restraint requirement for vehicles made in 1981, and thorough nationwide regulation of restraint systems —that Petitioner now seeks to impose such a requirement on more than 100 million vehicles made by more than two dozen manufacturers since the beginning of the 1981 model year.

SUMMARY OF ARGUMENT

The interlocutory ruling below does not conflict with a decision of any United States Court of Appeals or of any state court of last resort. Consistent with the decisions by all three of the other United States Courts of Appeals that have ruled on this issue, the United States Court of Appeals for the Third Circuit narrowly held that federal law preempts Petitioner's claim that, under state tort law, 1981 police vans equipped with manual seat belts rather than airbags or automatic seat belts are defective. Exactly like those other courts of appeals, the Third

Circuit held that enforcement of such a state law standard was not expressly preempted, but would frustrate the policies and purposes of Congress and the Department of Transportation and was therefore impliedly preempted.

Just four months ago, this Court denied petitions for writs of certiorari in those three other cases. *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S. Ct. 1781 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied* —— U.S. ——, 110 S. Ct. 1781 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, —— U.S. ——, 110 S. Ct. 1781 (1990). At the same time, this Court also denied a petition for a writ of certiorari in a case in which the California Court of Appeal likewise had held that federal law impliedly preempts state tort law claims based on the absence of airbags or automatic seat belts. *Nissan Motor Corp. v. Superior Court*, 212 Cal. App. 3d 980, 261 Cal. Rptr. 80 (1989), *cert. denied*, 110 S. Ct. 1782 (1990). *Accord Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. App. 1987), *cert. denied*, 487 U.S. 1236 (1988); *Gardner v. Honda Motor Co.*, 145 A.D.2d 41, 536 N.Y.S.2d 303 (N.Y. App. Div. 1988), *appeal dismissed*, 74 N.Y.2d 715, 543 N.Y.S.2d 401 (1989).

The Third Circuit's opinion in this case thus adds to the weight of authority provided by *Wood*, *Kitts*, *Taylor*, *Nissan*, *Wickstrom*, and *Gardner*, and further shows that this Court correctly judged that review of those rulings was unnecessary to secure uniformity of decision on the narrow question involved. Petitioner has identified no new development that suggests that such review is now needed.

Review is further unwarranted because the decision below is interlocutory. The court of appeals held that

one of Petitioner's claims was not preempted, and remanded for further proceedings. If Petitioner were to prevail on that claim, the issues presented in the petition now before this Court would be mooted.

Finally, as the United States observed when recommending that the petition for a writ of certiorari be denied in *Wood*, the federal regulation governing restraint systems "requires that all passenger cars manufactured after September 1, 1989, have passive protection systems." Brief for United States as Amicus Curiae at 19, *Wood v. General Motors Corp.*, 110 S. Ct. 1781 (1990) (No. 89-46). Therefore, unless a conflict develops among the federal courts of appeals or the state courts of last resort, the issues presented by Petitioner will be of diminishing importance.

REASONS FOR DENIAL OF THE PETITION

I. THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE HOLDING OF ANY OTHER CIRCUIT OR OF ANY STATE COURT OF LAST RESORT

Every United States Court of Appeals that has considered the issue has ruled that federal law preempts state tort law claims that motor vehicles equipped with manual seat belts, rather than airbags or automatic seat belts, are defective. Specifically, the First, Third, Tenth, and Eleventh Circuits have held such claims impliedly preempted by the National Traffic and Motor Vehicle Safety Act of 1966 and its implementing regulation governing occupant restraint systems, Safety Standard 208. *See Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S. Ct. 1781 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S. Ct. 1781 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, —— U.S. ——, 110 S. Ct. 1781 (1990).

Three state intermediate appellate courts also have held such claims preempted by federal law. *Nissan Motor Corp. v. Superior Court*, 212 Cal. App. 3d 980, 261 Cal. Rptr. 80 (1989), *cert. denied*, 110 S. Ct. 1782 (1990); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. App. 1987), *cert. denied*, 476 U.S. 1236 (1988); *Gardner v. Honda Motor Co.*, 145 A.D.2d 41, 536 N.Y.S.2d 303 (N.Y. App. Div. 1988), *appeal dismissed*, 74 N.Y.2d 715, 543 N.Y.S.2d 401 (1989). Only one state intermediate appellate court has disagreed, and a petition for review of that aberrational decision is now before the Pennsylvania Supreme Court. *Gingold v. Audi-NSU-Auto Union, A.G.*, 389 Pa. Super. 328, 567 A.2d 312 (1989), appeal filed. No state court of last resort has addressed the issue. Thus, as the United States observed in opposing the petition for a writ of certiorari in one of the cases in which a "no-airbag" claim was held preempted, "Although numerous federal and state courts have considered the preemption question, there is no conflict among the federal circuits or the state courts of last resort." Brief for the United States as Amicus Curiae at 7, *Wood v. General Motors Corp.*, 110 S. Ct. 1781 (1990) (No. 89-46).

Nevertheless, Petitioner contends that courts have "diverged widely" on this issue, and cites four federal appellate cases that she contends have "directly or indirectly held that state common law claims for lack of passive passenger restraints are not preempted and indeed have found that Section 1397(k) of the Safety Act expressly preserves these claims." (Petition at 7.) In truth, however, none of the four cases involved either airbags or automatic seat belts, none discussed the narrow preemption issue addressed here by the Third Circuit,[1]

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[1] The Third Circuit held that the broad doctrines of express preemption and preemption of the field do not apply. Petitioner's "no-airbag" claim was held preempted only because of its conflict with the applicable federal laws.

and the word preemption does not even appear in the opinions in three of those four cases.[2] In none of those cases, therefore, did the holding diverge from the holdings of the four United States Courts of Appeals that, as discussed above, considered "no-airbag" claims and found them preempted on narrow grounds peculiar to the regulation and regulatory history involved here.

Petitioner also cites a single district court case, *Murphy v. Nissan Motor Corp.*, 650 F. Supp. 922 (E.D.N.Y. 1987), in which a passive restraint claim was held not preempted. But that case was decided before all of the appellate decisions holding such claims preempted, and before this Court's decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), which undermined every point relied on by the district court in *Murphy*. That district court decision is also contrary to decisions by more than 25 United States District Courts throughout the country that have held such claims to be preempted.[3]

Petitioner also erroneously contends that "there is utter disagreement" in the reasoning of the many courts that have found preemption of "no-airbag" claims. (Petion at 8.) In truth, however, all of those courts have agreed on the fundamental facts and principles that re-

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[2] *Shipp v. General Motors Corp.*, 750 F.2d 418 (5th Cir. 1985); *Dreisonstok v. Volkswagenwerk A.G.*, 489 F.2d 1066 (4th Cir. 1974); *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968).

[3] *See, e.g., Dallas v. General Motors Corp.*, 725 F. Supp. 902 (W.D. Tex. 1989); *Surles v. Ford Motor Co.*, 709 F. Supp. 732 (N.D. Tex. 1988); *Kelly v. General Motors Corp.*, 705 F. Supp. 303 (W.D. La. 1988); *Kolbeck v. General Motors Corp.*, 702 F. Supp. 532 (E.D. Pa. 1988); *Staggs v. Chrysler Corp.*, 678 F. Supp. 270 (N.D. Ga. 1987); *Hughes v. Ford Motor Co.*, 677 F. Supp. 76 (D. Conn. 1987); *Wattelet v. Toyota Motor Co.*, 676 F. Supp. 1039 (D. Mont. 1987); *Schick v. Crysler Corp.*, 675 F. Supp. 1183 (D.S.D. 1987); *Baird v. General Motors Corp.*, 654 F. Supp. 28 (N.D. Ohio 1986); *Cox v. Baltimore County*, 646 F. Supp. 761 (D. Md. 1986); *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. 1986).

quire preemption of such claims. Each of those courts found that the Federal Government had explicitly authorized the installation of either manual safety belts or passive restraints. *See, e.g., Taylor*, 875 F.2d at 827. Each of those courts found that an essential safety purpose underlying Safety Standard 208 is to allow a choice among restraint options. *See, e.g., Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1124 (3rd Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3073 (U.S. July 27, 1990) (No. 90-174); *Taylor*, 875 F.2d at 827; *Wood*, 865 F.2d at 408. Each of those courts agreed that common law liability for lack of passive restraints would create a state standard. *See, e.g., Pokorny*, 902 F.2d at 1125; *Taylor*, 875 F.2d at 826; *Wood*, 865 F.2d at 410. Each of those courts found that the state standard asserted by the plaintiff would stand as an obstacle to the full accomplishment and execution of the federal purposes articulated by Congress and the Department of Transportation. *See, e.g., Pokorny*, 902 F.2d at 1123; *Taylor*, 875 F.2d at 827; *Wood*, 865 F.2d at 408. Each of those courts found that the Safety Act's general savings clause does not prevent the narrow preemption that governs here. *See, e.g., Pokorny*, 902 F.2d at 1125; *Taylor*, 875 F.2d at 827 n.20; *Wood*, 865 F.2d at 414-16. And, as a result, each of those courts held the "no-airbag" claim impliedly preempted.

In sum, the holdings and the core reasoning of the four United States Courts of Appeals that have addressed "no-airbag" claims are consistent, not in conflict. The Third Circuit captured both the holding and the essence of the reasoning of all of those courts by stating in its opinion below:

> Because common law liability for failing to provide passenger-side airbags or automatic seat belts would undermine the option of meeting federal safety standards by providing a manual seat belt system like that in the Ford van in which Duffy was killed, an option that Congress and the Department of

> Transportation clearly intended to preserve, Pokorny's action is preempted to the extent that it is based on this theory of recovery.

Pokorny, 902 F.2d at 1125.

II. THE COURT OF APPEALS RIGOROUSLY APPLIED AND CAREFULLY FOLLOWED THE PREEMPTION PRINCIPLES ESTABLISHED BY THIS COURT

Petitioner contends that a writ of certiorari should be granted because there is no conflict between her asserted "no-airbag" claim and the Safety Act's purpose of promoting motor vehicle safety, because the Safety Act's savings clause in any event precludes preemption of a state tort law claim of any kind under any circumstances, and because the court of appeals therefore erred in finding implied preemption. (Petition at 14-20.) That contention misapprehends in every respect the preemption principles established by this Court and carefully applied by the court of appeals.

A. The Court of Appeals Correctly Followed Well-Established Law in Ruling That Petitioner's "No-Airbag" Claim Conflicts with the Purposes and Policies of Safety Standard 208

Petitioner correctly asserts that the stated purpose of the Safety Act "is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." (Petition at 15, quoting 15 U.S.C. § 1381.) The court of appeals expressly relied on that same statutory language in its analysis. *Pokorny*, 902 F.2d at 1122. Petitioner also correctly asserts that this Court's decisions require that, where a federal regulatory system preserves a role for the states, as the Safety Act does in its savings clause, "conflict preemption analysis must be applied sensitively . . . to prevent the diminution of the role Congress reserved to the states while at the same time preserving the federal role." (Petition at 15, quoting *Northwest*

Central Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, ——, 109 S. Ct. 1262, 1276 (1989).) The court of appeals quoted and applied the identical language of this Court. *Pokorny*, 902 F.2d at 1123.

What Petitioner fails to recognize, however, and what the court below correctly applied, is the additional pre-emption principle that

> it is not enough to say that the ultimate goal of both federal and state law is [the same]. *A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal.*

International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987) (emphasis added). This is but a corollary of the broader rule that implied preemption exists whenever a state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 260 (1985).

The court of appeals expressly found, and Petitioner does not dispute, that allowing her "to assert that the Ford van was defectively designed because it did not contain airbags or automatic seatbelts frustrates the goals of the federal regulatory framework and undermines the flexibility that Congress and the Department of Transportation intended to give to automobile manufacturers in this area." *Pokorny*, 902 F.2d at 1123. The court futher explained that this flexibility to choose manual seat belts instead of airbags or automatic seat belts "is an essential element of the regulatory framework" and that the flexibility "was needed to 'provide sufficient latitude for industry to develop the most effective [occupant restraint] systems' and to help 'overcome any concerns about public acceptability by permitting some public choice.'" 902 F.2d at 1124, quoting 49 Fed. Reg. 28962, 28997 (1984).

Because the state law tort standard advocated by Petitioner would undermine these federal safety purposes and policies by reducing the flexibility that federal law provided, the court of appeals held that preemption exists. In doing so, the court hewed to this Court's admonition that "a state common law rule cannot take away the flexibility provided by a federal regulation, and cannot prohibit the exercise of a federally granted option." 902 F.2d at 1125, applying *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982). *Accord Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256, 262 (1985).

The state tort law standard advocated by Petitioner thus conflicts with the purposes and policies of the applicable federal law. The Third Circuit was correct in joining the First, Tenth, and Eleventh Circuits in so holding, and review by this Court is not warranted.

B. The Court of Appeals Correctly Followed Well-Established Law in Ruling That the Safety Act's General Savings Clause Does Not Preclude Narrow Conflict Preemption

The Third Circuit narrowly held that "it is well-established that a savings clause like section 1397(k) does not save common law actions that would subvert a federal statutory or regulatory scheme." *Pokorny*, 902 F.2d at 1125. Petitioner asserts that, because the Safety Act contains a general savings clause, it is error to allow a common law claim of any kind, under any circumstances, to be preempted. (Petition at 18-20.)

This Court, however, in decisions cited by the court of appeals below, has repeatedly rejected Petitioner's sweeping interpretation of general savings clauses. *See International Paper Co. v. Ouellette*, 479 U.S. at 492-94; *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-31 (1981); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915); *Texas &*

Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907). As this Court has explained, such savings clauses do not permit states to create causes of action, either common law or statutory, that would conflict with federal regulatory purposes and policies. Rather, such savings clause are included only because, without them,

> it might have been claimed that, Congress having entered the field, the whole subject of liability . . . had been withdrawn from the state courts, so [the savings clause] was added to make plain that the Act was not intended to deprive the state courts of their general and concurrent jurisdiction.

Kalo Brick, 450 U.S. at 328.

In *Abilene Cotton*, for example, the Court held that the Interstate Commerce Act precluded a common law action for damages for unjust and discriminatory rates, notwithstanding a broad savings clause that stated:

> Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

204 U.S. at 446. Recognizing the tension between the broad savings language and the purposes of the federal regulatory scheme, the Court held that the savings clause "cannot in reason be construed as continuing . . . a common law right" inconsistent with the underlying federal aims. 204 U.S. at 446. *Accord Ouellette*, 479 U.S. at 492-94; *Kalo Brick*, 450 U.S. at 331; *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 473-74 (1959).

If the savings clause in this case were as broadly construed as Petitioner would have it, any jury in any state could apply a standard that would require manufacturers to act in direct contravention of federal regulations promulgated to "meet the need for motor vehicle safety." 15 U.S.C. § 1392(a). Suppose, for example, that a plaintiff could sue a manufacturer under state tort law on the

theory that headrests mandated by federal safety regulations to prevent whiplash were defective because they partially obscured rear vision. Manufacturers would be faced with the choice of being prohibited by the Federal Government from selling vehicles *without* the federally required equipment, or being financially prohibited, by massive tort exposure, from selling vehicles *with* the federally required equipment.

Accordingly, section 1397(c) must be read in a manner that prevents a conflict between common law remedies and Federal Motor Vehicle Safety Standards. *See United States v. Campos-Serrano*, 404 U.S. 293, 298 (1971) ("If an absolutely literal reading of a statutory provision is irreconcilably at war with clear congressional purpose, a less literal construction must be considered."); *Lynch v. Overholser*, 369 U.S. 705, 710 (1962) ("The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, . . . for literalness may strangle meaning."). *See generally* 2A C. Sands, *Sutherland on Statutory Construction* § 46.07 at 110 (4th ed. 1984).

The legislative history of the Safety Act further shows that the savings clause does not preserve *all* common law claims under *all* circumstances. The Senate Report on the Act states:

> Moreover, the Federal minimum safety standards *need not be* interpreted as restricting state common law standards of care. Compliance with such standards would thus *not necessarily* shield any person from product liability at common law.

S. Rep. No. 1301, 89th Cong., 2d Sess. 12, *reprinted in* 1966 U.S. Code Cong. & Admin. News 2709, 2720. Similarly, the bill's sponsor, Senator Magnuson, stated, "Compliance with Federal standards would not *necessarily* shield any person from broad liability at the common law." 112 Cong. Rec. at 14320 (June 24, 1966). In short,

compliance with a federal Safety Standard does not *necessarily* prevent application of a state standard, but it does so in instances in which the state standard would impede the federal purposes.

Thus, the court of appeals correctly followed, and Petitioner has totally ignored, this Court's long line of decisions holding that a general savings clause cannot preclude conflict preemption. There is nothing novel or improper in the construction given to the savings clause below, and review by this Court therefore is not warranted.

CONCLUSION

As the brief for the United States stated earlier this year, "[W]e believe that the Court should stay its hand and see whether a conflict on the preemption question hereafter develops among the federal courts of appeals or the state courts of last resort." Brief for the United States as Amicus Curiae at 19, *Wood v. General Motors Corp.*, 110 S. Ct. 1781 (1990) (No. 89-46). "At this point, we see no pressing need for the Court to consider this issue." *Id.* Because of the uniformity of decisions holding "no airbag" claims preempted, such lawsuits are not yet interfering with the policies and regulations of Congress and the Department of Transportation. Accordingly, Respondent Ford Motor Company respectfully requests this Court to deny the Petition.

Respectfully submitted,

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August 24, 1990

APPENDIX

APPENDIX

APPENDIX

RULE 29.1 LIST OF SUBSIDIARY COMPANIES

Ford Motor Company has no parent corporation. The following is a list of domestic and foreign companies in which Ford Motor Company owns a significant (not necessarily controlling) interest, but which are not wholly-owned by Ford:

United States of America

Airlease Ltd.
Aries Technology
AT&T Automotive Services, Inc.
AT&T Fleet Services
Autolatina America, Inc., (Del)
Beech Holdings
Capricorn Investors Ltd.
Carlex Glass Company
Carnegie Group Inc., (Del)
Ceradyne, Inc.
Cimflex Teknowledge Corporation, (Penn)
Dunlop Automotive Composites Inc., (Delaware)
Edelson Technology Partners II
Eveleth Taconite Company, (Minn)
Excel Industries, Inc.
Fairtel Associates
Gecars, Inc.
Humbolt Mining Company
Inference Corporation
Lincoln-Rowe Management, (Mich)
Metropolitan Realty Corporation
New River Castings Company
Park Ridge Corporation, (Del)
Penstone, Inc.
Renaissance Center Venture
Rouge Steel Company
Seating Systems Technology, Inc.

Software Productivity Consortium
T.G. Ford Assoc.
U.S. Equipment Income Fund I
U.S. Equipment Income Fund II
U.S. Equipment Income Fund III
The American Road Insurance Company, (Mich)
View Engineering, Inc.

Argentina

Autolatina Argentina S.A.
Autolatina Argentina S.A. de Ahorro Para Fines Determinados
Invercred Compania Financiere S.A.
Transax Sociedad Anonima, Comercial, Industrial, y Financiera
Volkswagen Inversiones S.A.
Volkswagen Sociedad Anonima de Ahorro Para Fines Determinados

Australia

Australian Road Credit Limited
Ford Aerospace of Australia Pty., Ltd.
Ford Credit Australia Limited
Ford Credit Australia Wholesale Limited
Ford Motor Company of Australia Limited
Ford New Holland Australia Limited
Ford Sales Company of Australia Limited
New Holland Holdings Pty., Limited

Austria

Ford Bank Aktiengesellschaft (Austria)
Ford Motor Company (Austria) K.G.

Belgium

Ford Credit N.V.
Ford Motor Company (Belgium) N.V.
Ford Tractor (Belgium) Limited

Brazil

Apolo—Administradora de Bens S/C Ltda.
Autolatina Distribuidora deTitulos e Valores Mobiliaros Ltda.
Autolatina Financiadora S.A.—Credito, Financiamento e Invest.
Autolatina Leasing S/A—Arrandamento Mercantil
Autolatina Previdencia Privada
Autolatina S.A.
Autolatina—Comercio, Negocios e Participacoes Ltda.
Consorcio Nacional Ford Ltda.
Consorcio Nacional Volkswagen Ltda.
Ford Brasil S.A.
Ford Distribuidora de Productos de Petroleo Ltda.
Inter-Locadora S/A
Sociedade Paulista de Aparelhos Domesticos "SPAD" Ltda.
Transglobal Corretagem de Seguros Ltda.
Volkswagen de Brasil S/A
Volkswagen Factoring—Fomento Comercial S/A

Canada

Conix Corporation, (Del.)
Ford Motor Company of Canada, Limited
Nascote Industries, Inc., (Del.)
Trans Canada Glass Ltd.

Denmark

Ford Motor Company A/S

England

A C Cars Limited
Aston Martin (RDP) Limited
Aston Martin Finance Limited
Aston Martin Lagonda Design Limited
Aston Martin Lagonda Group Limited
Astno Martin Lagonda Limited

Aston Martin Lagonda U.S.A., Inc.
Aston Martin Sales Limited
Auto Club International Limited
Automotive Finance Limited
Dunlop Automotive Composites (UK) Limited
Iveco Ford Truck Limited
Lagonda Properties Limited

Finland

Oy FORD AO

Germany

Ford Investitions-GmbH
Ford Versorgungs-Und Unterstutzungseinrichtung GmbH

Holland

Ford Nederland B.V.

India

Escorts Tractors Limited

Japan

Autorama, Inc.
Hokkai Ford Tractor Co., Ltd.
Japan Climate Systems Corporation
Mazda Motor Corporation

Korea

Kia Motors Corporation
Korean Automotive Products Corporation

Mexico

Fabrica de Tractores Agricolas S.A. de C.V.
Implementos Agricolas Mexicanos, S.A.
ACONA B.V.
Nemak S.A.
Vitroflex S.A.

New Zealand

Vehicle Assemblers New Zealand Ltd.

Norway

Ford Motor Norge A.S.
Ford New Holland A/S

Sweden

Ford Credit AB
Ford Motor Company Aktiebolag

Switzerland

Ford Credit S.A.

Taiwan

Ford Enterprise Company Taiwan, Ltd.
Ford Lio Ho Motor Co. Ltd.

Turkey

Otosan Otomobile Sanayii A.S.

Venezuela

FANATRACTO—Fabrica Nacional de Tractores y Montores S.A.

AMIM Holdings Sdn. Bhd.
Associated Motor Industries Malaysia SDN.BHD.
Ford Taiwan Services, Limited
Halla Climate Control Corporation
Oy Ford Credit Rahoitus
Transcon Insurance Limited

AUTOMOBILE DEALERSHIPS

Al Bennett Ford Sales of Flint, Inc.
Al Neyer Ford, Inc.
Alberts-Johnson Ford, Inc.
Albion Ford-Mercury, Inc.
Alpena Ford Lincoln-Mercury, Inc.
Altoona Ford, Inc.
Baranco Lincoln-Mercury, Inc.
Bear Country Ford Lincoln-Mercury, Inc.
Berea Ford, Inc.
Big Valley Ford Lincoln-Mercury, Inc.
Will Russell Ford, Inc.
Buffalo Ford-Mercury, Inc.
C&L Lincoln-Mercury, Inc.
Campus Ford, Inc.
Canal Ford Lincoln-Mercury, Inc.
Castle Rock Ford-Mercury, Inc.
Champion Ford of Scranton, Inc.
Champion Motors, Inc.
Clinton Ford Lincoln-Mercury, Inc.
Coastal Ford, Inc.
Columbus Ford-Mercury, Inc.
Community Ford-Mercury, Inc.
Cornelia Ford Lincoln-Mercury, Inc.
Courtesy Ford Lincoln-Mercury Sales, Inc.
Courtesy Ford Lincoln-Mercury, Inc.
Cranberry Lincoln-Mercury, Inc.
Crossroads Ford-Mercury, Inc.
Crossroads Ford, Inc.
Crown Lincoln-Mercury, Inc.
Delta Ford Sales, Inc.
Duryea Ford, Inc.
Dyersburg Ford Lincoln-Mercury, Inc.
Economy Ford, Inc.
Edgar Ford, Inc.
Elkins Fordland, Inc.
Empire Ford, Inc.

Fairway Ford of Augusta, Inc.
Farmington Ford-Mercury, Inc.
Fort Valley Ford, Inc.
Freedom Ford Sales, Inc.
Friendship Ford, Inc.
Ft. Walton Beach Lincoln-Mercury, Inc.
Gold Star Ford Lincoln-Mercury, Inc.
Greater Cleveland Ford Mercury, Inc.
Green River Ford-Mercury, Inc.
Greenville Ford-Mercury, Inc.
Harbor Lincoln-Mercury, Inc.
Heritage Ford-Mercury, Inc.
Highland LM DBA Tyson LM
Hillsboro Ford-Mercury Sales, Inc.
Hood River Ford-Mercury, Inc.
Hub City Ford-Mercury, Inc.
Hunt County FLM, Inc., DBA Greenville FLM
Illini Lincoln-Mercury Sales, Inc.
Independence Ford, Inc.
Lake County Ford-Mercury, Inc.
Lakeland Ford Lincoln-Mercury, Inc.
Leader Motors Inc., DBA Leader L-M
Los Ramos Ford Lincoln-Mercury, Inc.
M&M Ford Lincoln-Mercury, Inc.
Marino Ford, Inc.
Marksville Ford Lincoln-Mercury, Inc.
McGehee Auto Plaza, Inc.
Metro Ford Automobile Sales, Inc.
Mon Valley Lincoln-Mercury, Inc.
Mountain Home Ford-Lincoln-Mercury, Inc.
Natchitoches Ford L-M Sales, Inc.
Noble Ford Lincoln-Mercury West, Inc.
Northhampton Ford, Inc.
Northwoods Ford-Lincoln-Mercury, Inc.
Osseo Ford, Inc.
Ottawa Ford Lincoln-Mercury, Inc.
Park Ford Sales, Inc.
Pavilion Lincoln-Mercury, Inc.

Pochelon Lincoln-Mercury, Inc.
Red Bluff Ford-Mercury, Inc.
Ripon Ford-Mercury, Inc.
River View Ford-Mercury, Inc.
Royal Lincoln-Mercury Sales, Inc.
Saginaw Ford DBA All American Ford
Shoals Ford, Inc.
Sonoma Ford, Inc., DBA Sonoma Ford-L-M
Spalding Ford Lincoln Mercury Sales, Inc.
Springfield Ford Lincoln-Mercury, Inc.
Suburban Ford Lincoln-Mercury, Inc.
Sun Valley Ford Lincoln-Mercury, Inc.
Sunbelt Ford-Mercury, Inc.
Team Ford, Inc.
Tower Ford Mercury, Inc.
Town & Country Lincoln-Mercury, Inc.
Tropical Ford, Inc.
Ukiah Ford-Lincoln Mercury, Inc.
Union City Ford Lincoln-Mercury, Inc.
Universal Ford Sales, Inc.
University Ford of Peoria, Inc.
Vandalia Ford Lincoln-Mercury, Inc.
Varsity Ford Lincoln-Mercury, Inc.
Verde Valley Ford Lincoln-Mercury, Inc.
Victory Ford, Inc.
Wellington Circle Motors, Inc.
West Covina Lincoln-Mercury, Inc.
Western Ford-Mercury, Inc.
Westwood Ford Lincoln-Mercury, Inc.
Yakima Valley LM DBA Sun City LM
32 Ford-Mercury, Inc.

TRUCK DEALERSHIPS

Atlantic Ford Truck Sales, Inc.
Bayou City Ford Trucks Sales, Inc.
Beltway Ford Truck Sales, Inc.
Bi-State Ford Truck Sales, Inc.
Bridge-Haven Ford Truck Sales, Inc.

Central Ford Truck Sales, Inc.
Crossroads Ford Truck Sales, Inc.
Delta Trucklease, Inc.
Golden State Ford Truck Sales, Inc.
Keystone Ford Truck Sales, Inc.
Lakeland Ford Truck Sales, Inc.
Mid-Cal Ford Truck Sales, Inc.
Mid-States Ford Truck Sales, Inc.
Miramar Ford Truck Sales, Inc.
Motor City Ford Truck, Inc.
Northside Ford Truck Sales, Inc.
River City Ford Truck Sales, Inc.
Sacramento Valley Ford Truck Sales, Inc.
Shamrock Ford Truck Sales, Inc.
Sooner State Ford Truck Sales, Inc.
Southside Ford Truck Sales, Inc.
Tri-State Ford Truck Sales, Inc.
Truck City Ford Sales, Inc.
West Gate Ford Truck Sales, Inc.